Considerations of morality and gender at different stages of the criminal justice process from lawmaking to sentencing : a comparison of English and Israeli laws on prostitution and marital rape.

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Considerations of morality and gender at different stages of the criminal justice process, from lawmaking to sentencing: a comparison of English and Israeli laws on prostitution and marital rape

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submitted for PhD
King's College
1997

In essence, this study traces the shifting borders of criminal law in several spheres, in two very different societies, England and Israel, through their relationship with social changes. Prostitution and Marital rape have been chosen to study and exemplify the scope of moral effect upon the criminal law and its strength comparing to other factors and pressures contributing to the formation of public policy, particularly in relation to gender. The way in which social perceptions have been interpreted and given a specific meaning in the law has been analysed throughout the criminal process, from legislation to sentencing, as each stage, conducted by different authorities with possibly different motives and policies, has contributed another aspect to an overall picture of the system. The analysed topics have presented conceptions of the appropriate scope for legal intervention, and demonstrated the legal treatment of several societal sections, each with its burden of stereotypes.

The gender factor, examining the law as men-made or gender-motivated, is directly connected to the legislation of morality by the aim behind most moral values to protect heterosexual family values, achieved by denouncing the different, allegedly dangerous. Recognising this, the distinct offences have been viewed in the broader context of violence against women, victimisation, offences within the family, and sexual regulation in society, helped by social legal theories, particularly of feminists and radicals. Additional issues, discussed briefly, have therefore included homosexuality, male rape, spousal homicides, and other subjects that may have exemplified particular pertinent angles of legal intervention. The variety has allowed to examine contrasting moral considerations and, consequently, a broader picture of the way the law is influenced and constructed may be seen.

The legal treatment has been considered in light of the important jurisprudential debates of the second half of the century, starting with the Wolfenden Report and the debate about the enforcement of morals, and continuing to victimless crimes, paternalism, feminism and law, rehabilitation opposite punishment and more. These have provided possible justifications for intervention or inaction, whose validity has been assessed.

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Introduction

Prostitution and Marital rape are the two topics chosen to study and exemplify the shifting borders of the criminal law. Should and can a moral society be generated by law? Are efforts made to this effect, whether consciously or not? The core is thus the scope given to moral and other non-legal considerations in the criminal justice process, the contributing factors to the formation of public policy, especially one to which the gender factor is essential. The invisible line between a society and its legal system will be explored. Questions will then arise when there is a conflict between morality and legal principles. On the whole, this work will seek to draw conclusions by a double comparison, comparing the legal treatment of marital rape and prostitution, then comparing the English situation to the Israeli one, through analysing relevant changes that have occurred in both jurisdictions over the last fifty years. The difference (or similarity) in the arguments dominating in either country allow to examine contrasting social changes and moral considerations and, consequently, a broader picture of the way the law is influenced and constructed may be inferred.

Contrasting England and Israel

It is the diversity of the Israeli and English systems that may contribute to conclusions regarding the incorporation of extra-legal factors into the criminal justice system. Ostensibly, the social climates with their load of values could hardly be more different, while in the legal realm the initial premise is of similarity, based on the derivation of Israeli criminal law from the English one. Things that would be investigated include, then, any local characteristic that has possibly affected the law, such as religion, the changing make up of society, along with jurisprudential theories. Even apparent similarities, such as seemingly improving legal position of women, will have to be explored in order to detect local variations and their impact on the legal process, particularly on the legal embodiment of changing morality.

The chosen period of study

The chosen period of study, from the 1950s until today, has constituted a short , if significant, chapter in English legal history, while it very nearly covers all of the Israeli legal history. This starting point was chosen as the Wolfenden Committee's Report has signified an agreed turning point in this legal area, and later developments, including the women's movement, could hardly be understood without the background of this particular era. As will be elaborated, the Wolfenden Report set the direction both for the theoretical discussion about law and morals and a public policy which would have acquired attention as a focal point in the following years of almost constant debate. The basic structure of not punishing prostitution per se while

criminalising solicitation, quite obvious now, was at the centre of this public policy. The debate about prostitution was thus chronologically parallel to the enforcement of morals controversy, another reason for choosing this particular topic. Furthermore, the 1950s were, at least according to the radicals, the only period of consensus[1] . The change from consensus to theoretical pluralism and controversy, presenting the important element of public opinion, will then be reviewed. References to earlier periods, including a brief introduction to the relationship between the Israeli law and the English one, will be given where appropriate.

Comparing Prostitution and Marital Rape

Legislation and law enforcement are but the end results of complicated proceedings, which, in their turn, are triggered and influenced by different ideologies, opinions and pressures, the exact significance of most is difficult to assess. At the probable extremes would be academic demands for cautious adherence to legal theory, on one hand, while the public at large may urge ad hoc solutions, based on heated moral arguments. Therefore, in contrast to the classical debate about morality and law, this account should not be restricted to looking into the formal expression, legislation. Attention will be diverted to the incorporation of values into different stages of the legal process, including courts' and police's reactions.

An assumption that will be assessed is that legislation regarding prostitution and allied offences has been one example of highly controversial criminal restrictions, some of which can be broadly classified as "victimless crimes" and, thus, raises questions of the admissibility of moral considerations' embodiment in the criminal law and the right to restrict human rights in those circumstances. Furthermore, prostitution may be unwelcome from many points of view, but it is not likely to be eradicated. Therefore, legislation has had to function on a thin line, both regarding the justification of its very existence and the purposes it should serve. Should it just reflect a moral stand or deal with a problem, and how? This curious and potentially loaded situation may become useful in examining social and legal changes in a certain society.

As will be seen, the emotional, moral and, finally, legislative responses to prostitution and allied functions have been vast and varied. The argument that will be considered is that the attitudes towards each of the trade's three components, the prostitute, the middleman or the ponce and the customer, will correspond with the differently perceived culpability. It seems that on the moral ladder the ponce is the most despised and denounced, and the prostitute follows, although she may evoke certain expressions of compassion. The customer, however, is seen as merely seeking to fulfil his needs, without a moral fault attached. Has the law followed this pattern, especially where implementation contradicted legal principles? Issues ignored by the law or

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[1] See "The Law and Order Society: the Exhaustion of 'Consent'" in *Policing the Crisis: Muggings the state and law and order* (1978), at p.319.

simply not enforced (e.g. kerb-crawling) will therefore be as important as those dealt with.

Besides the prohibitions themselves, the motives behind the law can be examined from the penological angle, through sentencing. The most obvious example is selective use of imprisonment throughout the years. Although it is difficult, for example, to separate the factors that eventually brought the abolition of imprisonment regarding soliciting, analysis of the law, the criticisms and the judicial experience may show distinct trends and patterns. Furthermore, sentencing exemplifies judicial direction of the law, bearing in mind that judges do not necessarily have to be radicals in order to modify the law, by setting a sentencing pattern, not always in line with the legislator's aims.

The unique feature of marital rape is the relationship between perpetrator and victim. Should this feature exempt him from being punished? From a conservative moralistic point of view, a desired law would have criminalised the visible forms of prostitution and the despised accompanying activities, perceived as a threat to family values, while ignoring marital rape. Marital rape will threaten the family only if exposed and denounced. Furthermore, the very complaint of the wife would have been presented as wrong, attaching a stigma to her, since it is capable of shaking not only the foundations of the specific marriage, but of the institute of marriage, with its traditional roles and obligations. This assumption seems particularly controversial considering that several activities related to prostitution are arguably victimless, while regarding marital rape there is a definite victim who may suffer a grave harm and to whom legal protection, if available, may be a last resort. Thus, marital rape was chosen due to its contrasting characteristics compared to prostitution.

Pertinent Questions

There is a double problem of justification, then, justifying the involvement of the law where no victim may exist, while justifying the silence of the law (including particularly lenient sentences or inadequate enforcement) where victims are discouraged. It should not be forgotten in this context that the legal silence would probably reinforce the strength of a certain moral outlook, the conservative one, and, thus, dissuade victims from seeking help elsewhere. On the other hand, should legal principles be abandoned when the moral view seems more "worthy", such as in promoting marital rape as a crime?

This account will attempt to analyse whether the law has adopted any of these moral views, elaborated later, as a public policy, how, and could the adoption be justified according to legal theory. Legal solutions will be judged by legal principles that have supposedly constituted the foundations of both legal systems, and explanations for any legal changes will be sought.

A principal theme is the gender factor, examining the law as a men-made or gender-biased one. It is directly connected to the legislation of morality by the aim behind most moral values of protecting heterosexual family norms, achieved by denouncing the different, the perceived to be dangerous. The relevance of gender is obvious, since most rape victims and prostitutes are female, and the sexual aspect of the offences is apparent.

It is submitted that the gender factor finds its way into the law by the endorsement of morality-based portrayals of each of those involved, from the borrowed fundamental differentiation between the culpability of the prostitute against that of the customer. Legal expressions of differentiating attitudes towards male and female conduct will provide examples in which the law has bent its principles in order to accommodate gender-related moral values.

An aspect that will be stressed is the influence of the development of the women's movement, feminist literature and theory, and radical criminology, aware of gender issues. Both issues. prostitution and marital rape, have naturally attracted a lot of attention from this movement. although they have obviously posed different dilemmas. Feminist theory, far from being a mere jurisprudential theory, has been a social as well as a moral one, thus presenting a competing set of values to the current one. Assessment of the legal situation according to feminist criteria will be therefore accompanied by the question whether this competing "new morality" should and has been advanced by the law.

The improving, or, rather, changing status of women will be reflected, along with supposedly changing perceptions of the family, in a world where it may no longer be a sacred institution and alternatives have ostensibly been recognised. The decreasing power of religion with its morals is another consideration in assessing legal reactions to a changing pluralistic society.

Other, briefly mentioned, themes include homosexuality. Its characteristics, in the present context, are comparable to those of prostitution, namely, a possibly victimless crime which has for a long time entailed extreme moralistic judgements. However, it is one of several issues that will offer a wider perspective of power in society, not necessarily gender-related, and the assumption that dominant morality is not only male, but heterosexual. Two similar issues are male rape and male prostitution.

Along the way, recent developments that highlight the enduring relevance of the discussion beyond mere academic interest, will be pointed.

One such significant change, that corresponds with the legal and social developments constituting the core of this study, is the increased power of the religious parties in the last

general election in Israel[2], and the establishment of a coalition government comprised of right wing parties and religious ones. Religious influence, a potentially distinguishing factor between England and Israel, will be discussed rather extensively in different contexts. Under such conditions, the importance of pursuing legal principles and evaluating policies according to an agreed conceptual framework, as will be suggested, should be stressed.

[2] The elections took place on 29th June 1996. The combined power of the religious parties equals 23 Mandates out of the 120 members Knesset (compared to 18 before), but their coalition is vital in the race between the two large parties.

Prostitution - England
The Wolfenden Report

Introduction

Three parameters will be used for examining and assessing certain public policies. Firstly, there are the aims, declared or implied. Then, the means set to achieve them, and, thirdly, the operation of the law. The subsequent changes made to the law, following failed goals, will be closely examined, whether changes of aims or of means. The presumed basis for legislation throughout the period has been the growth of crime and the attempt to defeat it. However, fundamental questions such as the very classification of a certain conduct as "crime" and the different influences on this process of classification are the base of a complete analysis of a public policy. Inevitably, the process of analysing value choices made in state policies, in the enforcement stage and in punishment, includes some social and moral philosophy tasks, besides the jurisprudential examination.[1]

As for the background of the Wolfenden Committee, it is sufficient to note that there had been a pressing need that necessitated the appointment of the Committee, in order to offer solutions for practical problems. A detailed account of the sociological setting may be found in Newburn's "Permission and Regulation"[2] . Briefly, the immediate reasons for the appointment included a "moral panic", the fear that London was becoming known as the "vice capital of the world", a consequence of the increasing visibility of prostitution coupled with a focus on British streets due to occasions such as the Coronation in 1953, and fears about immigration regarding ponces and prostitutes alike[3]. Stressing the public aspect is important, since one of the prominent topics that will be explored is the relationship between public policy and public opinion.

The contents of the Wolfenden report and the subsequent 1959 Act have affected the legal climate for a long time. Its echoes are found in the important jurisprudential debates of the second half of the century: law and morality, victimless crimes, paternalism, feminism and law, rehabilitation opposite punishment and more. This chapter should thus read as an introduction to different considerations concerning prostitution and allied offences, as well as an outline of themes and theories that will be followed throughout the account . Therefore, going into some detail is unavoidable, in order to lay sound foundations for later analysis.

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[1] See: Bottoms,A.E. (1987), at 261.

[2] Newburn, T. (1992) .

[3] Ibid. at p.51.

The Committee's Aims - The Underlying Philosophy Of The Report

Law and Morals

The Wolfenden Committee's official assignment was to consider "the law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes..."[4] .

These terms of reference did not necessarily imply that the committee should have questioned the moral basis for the law. The request could have been feasibly construed as a limited one: to consider the usefulness of the existing law and suggest new measures, as later committees did. However, the Wolfenden Committee members formulated their view of the function and scope of the criminal law in a much -quoted way: "In this field, its function ... is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[5]

Of equal importance is the statement regarding the limitations of the criminal law: "It is not...the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined."[6]

One example of actions that were not punishable by the law, although morally wrong, was prostitution as such. Since it had not been criminalised before, this was not a new proposition and it complied with the Committee's statement about the role of the law. It still has to be seen just how far from criminalisation prostitution has actually remained following the Committee's recommendations.

The gist of the statement is a distinction between private and public morality, a motif that will surface in this account frequently, as it has been central to legal theories ever since. Although there are, undoubtedly, certain crimes that are regarded as sins, the committee appear to have intended to remove the religious - moralistic significance of the subject matter. Consequently, the private and the sinful are being largely removed from the application of criminal law.

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[4] Report of the Committee on Homosexual Offences and Prostitution, 1957, ch.1 para.1 (hereinafter referred to as The Wolfenden Report).

[5] ibid. ch.2 para.1

[6] ibid. ch.2 para.13

Although a not-dissimilar stance had been taken by the 1928 Street Offences Committee ("...the law is not concerned with private morals or with ethical sanctions" [7]), the statement that gained the name "the Wolfenden strategy"[8] , or "philosophy", was nevertheless the focal point of much controversy, since it was accepted as a commitment to a particular philosophic stance, the Utilitarianism of Mill [9] , in its insistence on the necessity for special circumstances to exist in order to justify legal intervention.

Hence, the report was one of the factors that initiated the renewed debate about relationship between law and morals[10] .

Assuming a degree of familiarity with this prominent jurisprudential debate, only highlights will be mentioned. Perhaps the most important criticism, and the opening shot in the debate, was that of Lord Devlin[11], who opposed the distinction between "private morality" and "public morality", arguing that established morality was necessary to the persistence of society and, therefore, justified the intervention of law in enforcing it. Although there is no theoretical limitation, Lord Devlin suggested a few guidelines for the legislator, such as to respect privacy as much as possible and to be concerned with the minimum and not the maximum of morals[12] .

The main criticism of Lord Devlin's stance was made by Professor Hart who argued in "Law, Liberty and Morality" that the fact that a certain behaviour was immoral according to the common standard, did not in itself justify making it criminal. The only justification for using power against a person was preventing harm to others[13] . Hart's approach is definitely closer to the one revealed in "the Wolfenden strategy", and the influence of Mill's theory on both has been acknowledged[14].

Despite the many interpretations and criticisms that followed in this debate, it seems that Hart's and Devlin's arguments best represent the opposing sides of the controversy.

The importance of the debate in the present context is twofold. Firstly, it enables to assess

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[7] Report of the Street Offences Committee 1928. Quoted in Hall, J.G. (1958) .

[8] Hall, S. (1980).

[9] See: Mill, J.S. (1859).

[10] For a review of earlier theoretical limitations on the criminal law see: Walker,N. (1987) at ch.14.

[11] Devlin, P. (1959).

[12] Ibid.

[13] Hart, H.L.A.(1963).

[14] For a third approach see: Raz J., (1986), from p. 412. Raz understood the harm principle not as a principle whose function was to curtail the freedom of governments to enforce morality, but a principle about the proper way to do that. His view about the importance of the moral principle of personal autonomy will become more relevant regarding rape.

Wolfenden's practical recommendations in light of its supposed philosophic stance, since the practical importance of the "Strategy" is, as S. Hall analysed, the shift, even if slight, from state-control to self-control[15]. Secondly, the debate helps in understanding later movements. As will be seen, although the "Wolfenden Strategy" has been ostensibly endorsed ever since, in practice many developments have apparently derived from a different approach, one that endorsed enforcing morals for their intrinsic value and regarded morality as a valid justification for legal action. The underlying assumption of this study is the one that underlies the theoretical debate, that it is indeed possible to a large extent to formulate rules or principles which will help to decide whether a given sort of behaviour should or should not be criminalised.

Even without probing the more theoretical aspects of the issue, the policy outlined in the Report lent itself to controversy, and to various interpretations, by using ambiguous definitions such as "private" "decent" and "injurious". These terms inevitably lead to judgment of values, as suggested, already then, by Hall Williams[16] . Reading the committee's recommendations in light of the said strategy thus evokes the fundamental question of demarcation. Was the proposed law excluded from the private sphere except for where the special circumstances existed? Later, it will be asked whether this dividing line was justified in the first place.

Politics and the Enforcment of Morals

Another basic premise is that when dealing with legislation, ultimately a political product, the translation of theory into political stances should be examined, as should the differences between political and academic attitudes. The gap between theory and practice, often created by vast public pressure to which politicians usually react, is one of the main issues to be stressed.

A very schematic picture of the beliefs held by right wing and left wing politicians was offered by Walker [17] . According to Walker's argument, while the right wingers usually hold that it is both right and expedient that the scope of the criminal law should cover most forms of conduct which are socially or morally undesirable, the left wingers hold that the scope should be limited to forms of conduct which are a serious threat to individuals or society and cannot be controlled by less dramatic means. Besides the implied friction about enforcement of morals, this scheme introduces another factor that will become relevant, the suitability of criminal law with its severe measures to deal with specific cases, even when theoretical justifications have been fulfilled. The analysis of the discussed issues will attempt to offer a more complete and probably complex picture of political forces (including pressure groups) as well as its relationship with certain theories and with the rather elusive 'public opinion'.

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[15] Hall,S. (1980) .

[16] Hall Williams, J.E. (1958).

[17] Walker,N. (1987), at p.187.

Law and the Public's Moral Values

Research has shown that for the public at large, a distinction between an immoral act and a potentially harmful act may well be a fiction. Kelly & Winslow[18], who surveyed public reactions to a long list of conduct, including the discussed acts, concluded that an act that was rated as being highly (morally) offensive, was similarly rated as being highly disruptive, without parity to the socio-economic status of the respondent. One possible interpretation is that the public (if such a generalisation is plausible) is in fact closer to Devlin's stance than to Hart's. Because, interpreting this approach according to Hart, the demand for harm is fulfilled wherever there is a moral wrong. This conclusion may explain the political side of legislation, the public pressure on the legislator to prohibit certain conducts even if theoretical justification for it is scarce. This point will gain importance when it is analysed just how many of the provisions do not fit the underlying philosophy, and how the gap widens even further in the 1959 Act.

The other side of the coin is the possible influence of the law on public morality.

Opposition to legal modifications relies sometimes on the "declaratory theory", the view that one of the functions of the criminal law is to inform members of society of at least some of the moral attitudes of that society, and to so influence their own moral judgment, based on some psychological experiments of the influence of majority view on individual judgments.

Consequently, modifications are allegedly likely to weaken moral attitudes. This argument was used widely about homosexuality and the intended legal changes. It will become relevant again regarding the marital rape exemption and the likely effect of legal condemnation, along with wider claims about correlation between moral perception of women and their legal position.

However, research does not seem to either support or refute the theory unequivocally. Walker & Argyle[19] , who conducted a survey in 1962, concluded that this argument was not plausible, there was no short term influence on the state of moral views. Or, as West put it, toleration of minority practices, such as prostitution, did not cause the majority to change their ways.[20]

On the other hand, a later research conducted by Walker and Berkowitz did offer experimental support for the declaratory theory [21] . A similar finding was the by-product of a larger scale experiment by Walker and Marsh[22] . The knowledge of the legality or illegality of conduct clearly influenced moral attitudes toward it.

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[18] Kelly,D.H. & Wilnslow,R.W. (1970).

[19] Walker,N. & Argyle,M. (1963-4) .

[20] West,D.J. (1974).

[21] Berkovitz,L. & Walker,N. (1967).

[22] Walker,N. & Marsh,C. (1984).

The basic question remains whether moral guidance *should* be a task of the criminal law at all, or should the legislator, bearing this consequence in mind, be extremely cautious when dealing with morally sensitive subjects, since the danger exists that the criminal law may function as "a powerful means of inducing people to believe that a given type of conduct is strongly condemned by their peers"[23] while denunciation may not be so widely spread. Thus, it may be argued that prostitution and homosexuality represent reproach of a shrinking, if powerful, part of the changing society, while regarding marital rape the argument will be more complex, as an ostensibly condemning legal change may be weakened by less vindictive legal agents. According to the declaratory theory, the legal changes will affect the prevailing moral views.

It should be considered that this process may also make a historical analysis of the law, specially in morally ambiguous areas, more difficult to follow. Was a condemnation the cause for legislation, or the result of it?

The Walker & Marsh research[24] also showed that sentencing trends had a negligible influence on people's opinions, opposite an influential assumed peers' disapproval, regarding morally ambiguous cases[25] . This point will be evoked again when discussing sentencing patterns and reasons for taking particular punitive measures, as even imprisonment for a very short term defies liberty therefore requires justification.

Radical Theory and the Enforcement of Morals

Another theoretical reexamination of the issue appeared several years later, when the Report attracted the interest of the Radical Criminologists. S.Hall accused the doctrine of being responsible for the emergence of what he called "double morality" and "double taxonomy", a result of the Strategy's distinction between "public good" and "private morality", regarded as fundamentally hypocritical[26] . The notion of a double morality has since been used in other legal contexts, by feminists as well as radicals, and will be discussed.

Other radical writers, Young & Greenwood, analysed the Report as self- contradictory in its determined adoption of Mill's Utilitarianism on the one hand, and interventionism on the other, recommending measures that could not be justified according to liberal approach[27]. This criticism, supported here, will be thoroughly explored when examining the recommendations themselves, and when reviewing the late 60's - 70's, the heyday of Radical Criminology. Along

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[23] Walker,N. (1987), at p152.

[24] Walker,N. & Marsh,C. (1984).

[25] Ibid.at p.27,37-41.

[26] Hall,S. (1980) , at p. 12-14.

[27] Greenwood, V. and Young, J. (1979) .

the same lines, from an economic point of view, the Marxist radicals interpreted the aim of protecting the institution of marriage and the nuclear family (threatened by the prostitute`s earning power) as necessary for economic exploitation of industrial women.[28] The importance of these theories is in emphasising the socio-political dimension of the "enforcement of morals" question, not the philosophical-legal aspect of Lord Devlin's and Hart's arguments. Since the position of women reflected in the law (hence feminism) will be a central issue in this study, the socio-political angle will inevitably be of utmost importance. Similar propositions will be raised by Feminist writers, and will be elaborated mainly in the context of marital rape, where the institution of marriage, with its economic implications, will become crucial.

Contemporary Reactions

Response to Wolfenden's Strategy spread far beyond the academy. Along with public media reactions, numerous commentaries, published in legal and criminology magazines, reflected the varied opinions of professionals involved in different aspects of the machinery of justice.

The alleged attempt to distinguish between "crime" and "sin" was not the only criticised point. The maintained criterion of "privacy" was criticised by law practitioners and by academics[29] as ambiguous. G.C., for instance, argued that "private morals" could be very much in the interest of the community, exemplified by incest[30] . (Although this example seems to better represent the exception, the special circumstances of protecting the vulnerable, particularly children.) In yet another article, G.C. added that "there is no hard-and-fast definition of privacy" and that "...clearly "private" had little relevance to the criminal law"[31] . The fact that this inadequate notion has become central to the debate until recently, as if it were an established principle, appears to support these criticisms.

Other voices in the controversy surrounding the first Chapter of the Report were those of law enforcement agents, similarly holding conflicting opinions. Thus, L.Fairfield, a social worker, urged the enforcement of "a Christian standard of conduct" and to apply regulations made indispensable by the "inherently offensive nature of their trade"[32] . The importance of the criticism is in the direct reference to religion based morality, scarce in legal literature, and an issue that will be discussed later.

One example for an adverse approach is that of Miss Peto, a former superintendent of the

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[28] West,D.J.(1974) ,at 472.

[29] e.g. Hall Williams (1958) .

[30] G.C. (1957a,Sep 21).

[31] G.C. (1957b,Sep 28).

[32] Fairfield, L. (1958).

Metropolitan Police, who argued for a lesser control by legislation, realising that "one couldn't force people into morality by Act of Parliament"[33] . These two positions signify both the wide scope of the debate at the time, and the short distance between theoretical arguments about law and morals and the practical implications of holding one view or the other.

The Committee's Specific Aims Regarding Prostitution

As mentioned, the committee was required by the terms of reference to consider the law and practice regarding offences in connection with prostitution and solicitation for immoral purposes.

More specifically, though, the committee was appointed as a result of a growing public concern about the "visible and obvious presence of prostitutes in considerable numbers in the public streets..."[34] .

Accordingly, an assumption that the main purpose of the report would have been to suggest a policy that would lead to diverting prostitutes from the streets seems reasonable. Next, a review of the recommendations will analyse whether that was indeed the case. Consequently, attention will be given only to those recommendations pertinent to the discussion that will hopefully contribute to the understanding of the recurring questions.

THE RECOMMENDATIONS

STREET OFFENCES

Considering Wolfenden's Strategy and the practical, specific aims, it is not surprising that the committee's declared prime consideration was "the right of the normal, decent citizen to go about the streets without affront to his or her sense of decency"[35] .

Before assessing the recommendations themselves, it is worth bearing in mind that later criticism, that of the Radical Criminologists[36], pointed at the similarity between this "normal, decent citizen" and Lord Devlin's "right thinking man on the Clapham omnibus"[37], an orthodox standard against which public conduct was to be measured. Similarly, Greenwood & Young

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[33] Peto, D.O.G. [1958].

[34] The Wolfenden Report, para.229.

[35] Ibid. para.249.

[36] Hall,S. (1980), at p.10-13.

[37] Lord Devlin (1959) , at p.15.

recognised in the distinction between the "normal" and the "deviant" the evolution of a bifurcation process, an elaboration of the consensus myth, based upon the need to condemn deviant behavior because it represents concrete example of individual evading the rules[38] . Continuing along this line, then, the desire to maintain the "just" and "normal" order, as expressed in the prime consideration, contradicted the Millian definition of liberty which had been the supposed base for the strategy, and showed inclination towards Devlin's approach in adopting some "normal" standard that may be construed as a "common - consensus morality". This theme of presenting supposed standards of normality, which coincide to a large extent with values of the stereotypical politician (male, middle class, ethnic majority, etc.) will continue to appear under different guises, and should be acknowledged.

The other element in the proposal, focusing on street crimes (and, as will be seen, regarding punishment as an objective in its own right) is a basic element in criminological theories such as that of Wilson. Although this later theory was developed at a time when attention has swung back to street crimes[39], Wilson's justification may elucidate the prominence of this element. Wilson's interpretation of a "proper design of a public policy" emphasises this factor because of the part street crimes play in violating the social contract, by the fear and the consequent alienation they cause, and because of the perception of those crimes as immoral behaviors. Since the nuisance element did not always apply as a distinguishing factor between the treated offences and other, ignored, behaviors, it seems that the scope was determined by similar background factors, even if not expressly acknowledged.

The Previous Law

The law regarding prostitution before the Wolfenden Report had been an assemblage of legislative efforts, few of them specifically intended to deal with prostitution (e.g. the often used Vagrancy Act 1834), specific legislation being local and sparse. The offenders were usually charged - under the Metropolitan Police Act 1939 and the City of London Police Act - with causing annoyance by loitering or soliciting in a public place for the purposes of prostitution.

"Common Prostitute"

The term "common prostitute" had been used in statutes since 1824. The Committee was fully aware of the various criticisms[40] , prominently regarding lack of definition (except for a court - used - formula), basing the offence upon the category of people, not acts, and the stigma

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[38] Greenwood & Young (1979) , at p.152-154.

[39] Wilson,J.Q. (1985) .

[40] The Wolfenden Report , para.258.

attached by it to the woman both before the court trial and afterwards. In J.G.Hall's words: " A policeman in the case of a charge of larceny does not begin his evidence by ' the thief ' ..."[41] . Nevertheless, the Committee believed in the necessary retention of the words for the effective operation of the law, and dismissed the criticism as unfounded[42] . An elaborate account will follow, in the context of the subsequent Act.

"Annoyance"

The recommendation was that the law be reformulated so as to eliminate the requirement to establish annoyance. The Committee reasoned that "an amendment of the law in this sense would insure that an offender was charged in terms more appropriate to the facts of the situation", in other words, the offence being a self-evident public nuisance[43]. Contemporary critics, such as J.G.Hall, argued that it contradicted the legal principle of the irrefutable presumption of innocence, hence required an annoyed person's evidence[44] . G.C. assumed that police, and perhaps magistrates, would be relieved by the change[45] , a remark that may suggest that the real consequence of the recommendation would have been to facilitate convictions, based on police evidence alone. Such an effect would seem reasonable considering the Committee's prime consideration, protecting the "normal" citizen even at cost of infringing other's rights. The apparent commitment to this objective can also explain the adherence to the offensive term "common prostitute". Furthermore, it is difficult to see how this recommendation can coexist with the inclination towards Mill's ideas. It clearly dismisses the notion of "harm" (i.e. public nuisance) as an indisputable fact, while, according to Mill and followers such as Hart, harm is the only justification for the operation of the law, and therefore a more careful and thorough examination of it would have been expected, not to mention the accused's right to contest it. This recommendation is the first to represent, then, the possible friction between legal theory and practical evidential problems, and a not always fulfilled striving for balance.

Cautioning System

The introduction of the caution system was meant to serve a double aim; to deter beginners from proceeding, without court intervention, and secondly, to provide the court a better proof of the woman being a "common prostitute", possibly demanded due to the proposed increased fines[46] .

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[41] Hall, J.G. (1958), at p.181.

[42] The Wolfenden Report, para.259.

[43] The Wolfenden Report , para.274.

[44] Hall,J.G.(1958) .

[45] G.C. (1957a) at p.608.

[46] The Wolfenden Report, para.269-270.

Another suggested role of the system, as introduced to Parliament by the Attorney - General[47] . was to constitute a safeguard against "charging a respectable, innocent woman".

Three general issues come across from these arguments: fear for the young, the problem of evidence, and anxiety about the innocent bystander caught in the criminal justice system. All these issues have often been raised in the context of criminal legislation in the studied areas and will thus be traced throughout the account. Details of the recommendations and the subsequent law will exemplify just how important each of them has been.

Following the Scottish example, the Committee recommended transferring the particulars of the woman, cautioned for the first time, to a welfare worker. They called for a "consideration to be given to the practicability" of such welfare agency's intervention. However, the Committee did not embrace the more informal system which operated in Edinburgh, where the woman was cautioned twice on the street before a formal caution was issued.

On the contrary, the system have certainly increased police discretion and was rightly criticised for that by Matthews (along the presumption of guilt attached to the "common prostitute") as retaining the double moral standard, not allowing the offender to challenge it, the result being reinforcement of the claim that the law was not concerned with private morality[48] .

Despite criticism of the system's particulars, the differentiation between the uninitiated prostitute and the veteran was accepted as obvious. J.G.Hall, for example, suggested that a "wise" use of the first court appearance could be more effective than cautioning. Hall argued against the recommendation empowering the court to remand in order to obtain a social report, suggesting that the first time offender be sent to a special remand home for 14 days and then to a special rehabilitation centre[49] . Hall's proposal was probably unrealistic, necessitating vast resources, but, more fundamentally, it disregarded the deprivation of autonomy involved, subjecting it to the superior aim of rehabilitation. It clearly represented the rehabilitative approach, and the unsatisfactory solution of the cautioning system to those who believed in rehabilitation. This debate is also significant in understanding the penal policy pursued by the Committee. Was the seemingly rehabilitative proposal just a facade for pursuing other ends?

Penalties

The Committee proposed a progressive system of penalties for repeated offences, the previous

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[47] Parl.Deb.Commons 1958-59, vol.598,col.1382.

[48] Matthews,R. (1986). For an explanation of the concept "double standard" in this case, see the Radical Criminologists criticism of the Strategy e.g. Hall,S. (1980). and Greenwood & Young(1979) .

[49] Hall, J.G.(1958).

maximum fine regarded as not substantial enough to deter [50]. The Committee was aware that prostitutes would have to be more active in order to afford the fine, and that inadequacy was the reason for recommending the controversial sanction of imprisonment[51], undoubtedly the severest measure available.

Fears, such as Fairfield's, were thus evoked, that higher fines, coupled with an increased need to find suitable premises, would generate a more organized enterprise, involving an undesirable "class of entrepreneurs". Another concern was for securing an honest administration of the law by police, when higher fines would, undoubtly, mean greater bribery temptations[52] . This argument may have also been supported by the increased police discretion, which would have paradoxially contributed both to police's power and vulnerability. However, the Committee dismissed this argument as not serious enough to outweigh the advantages of the amendments[53].

The introduction of imprisonment was ostensibly intended by the Committee to divert more prostitutes towards the probation service, besides deterrence. The Criminal Justice Act 1948, provided that the offence must not carry a sentence fixed by law[54]. The Act left a maximum discretion to the court, considerations including the nature of the offence and the character of the defendant. The Committee must have assumed that most prostitutes would be found suitable for probation. It may be asked whether the Committee presumed the possibility of probation as a result of the offender's gender (inevitably female), assuming a tendency not to imprison women if it could be avoided.

This recommendation attracted wider criticism. J.G.Hall regarded it as a "quite hopeless way of dealing with a phenomenon which had existed since times began", supporting this view by the Prison Commissioner's plea against short sentences of imprisonment, which allegedly achieved nothing. Hall too expressed the prevailing fear that tough measures would merely induce underground prostitution and organized crime[55] . The Committee acknowledged it[56], but claimed that it would have to be confronted by a rigorous enforcement of the law regarding exploitation. Another, more tolerable anticipated result was an increase in small, local advertisements[57].

The separate issue of exploitation, which may paradoxically be the only valid justification for legal intervention, will be discussed later. It should only be noted that the drive behind the

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[50] The Wolfenden Report , para.275-276.

[51] Ibid. para. 277.

[52] Fairfield,L. (1958) , at p.173.

[53] The Wolfenden Report, para. 288.

[54] The Criminal Justice Act 1948, s.3.

[55] Hall,J.G. (1958), at p.181.

[56] The Wolfenden Report , para.286.

[57] Ibid. para.286-287.

committee's recommendation was so strong that this possible, even if unintended, approbation of an increased commercial exploitation, which could lead not only to the failure of the policy but to an aggravated situation, was ignored and would therefore be perceived by the Radicals as another proof to the "double morality" argument[58] .

G.C. criticised the committee's expectation that prostitutes would prefer the probation option and be reformed, and the underlying assumption that probation generally only works under threat of imprisonment. Furthermore, he expected a considerable increase in female prison population, a situation which was, apparently, not fully acknowledged in the Report[59]. Similar criticisms objected to establishing treatment upon threat of punishment[60]. Others, however, such as King[61], argued that even consent given under pressure (i.e.the option of imprisonment) could still be valueable, as a helpful medical treatment would be. Both stances are easily explained by different approaches towards paternalism, a theoretical ground that will be explored shortly.

The suggested measures were more interventionist, punitive and repressive then, than the preceding law. The particular form of the penal policy reflected the emphasis on the committee's prime goal, clearing the streets. Accordingly, the chosen measures were mainly aimed at deterrence and containment. The possible rehabilitative effect of the penal system came second, and even then, it was criticised as unrealistic in the circumstances, therefore inapplicable. Another policy consideration, largely ignored, was the wish to reduce prison population, especially regarding short-term sentences. Consequently, it will be asked whether the outlined policy achieved the aims and at what price. Moreover, was it theoretically justifiable, or could other methods be used?

Getting a Social or Medical Report

The committee recommended a judicial power of remand in custody, for up to three weeks, of any prostitute convicted of a street offence for the first or second time, to enable producing a social or medical report[62]. The ground was, again, a deep concern for the reform prospects of the young prostitute. It exemplified the denunciation of prostitution embodied in the Report, as a trade that girls should be encouraged to leave, even though it was not an offence per se. The committee manifested a moral posture which evokes the debate about enforcement of morals, or, rather, paternalism, since the application of a paternalistic approach is seemingly the only justification for such a recommendation.

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[58] Hall,S. (1980) , at p.13.

[59] G.C. (1957a) , at p.608.

[60] e.g.Greenland,C. (1961) .

[61] King,J. (1969).

[62] The Wolfenden Report ,para.280.

Hart claimed that even someone who regarded preventing harm as the sole justification for punishment may nevertheless refer to moral principles while prescribing the appropriate severity of the sanction[63]. This recommendation deals with punishment, or with measures intended to determine the right punishment and treatment, but the inclination towards a paternalistic policy may still need to be justified. While the aim was to help the judge in referring the girl to the right social services, her liberty was meanwhile denied, without obtaining her consent.

The reformative and rehabilitative aim, which flourished until the 1970's, was a penal policy directed, ever since the Victorian era, by the belief that a paternalistic approach would improve the offender, based upon religious-moral sources[64]. A similarly directed influence emanated from the political arena, the wish to enforce middle-class values. The paternalistic aspect is apparent, and so is the underlying view of the world as divided into "them" and "us", normal opposite deviant, right against wrong.

Gerald Dworkin characterised paternalism as "interference with a person's liberty for his own good"[65] . All the elements of Dworkin's definition are present, as implementation of this recommendation would have led to a restriction of the prostitute's freedom in the immediate term and in the long run, through subjection to welfare agencies, and promoting her benefit was the expressed intention of the committee. While intervention achieved by the street offences may be construed as "impure", or "indirect", paternalism, since the class of persons whose freedom is restricted (prostitutes) is not identified with the class of persons whose benefit is promoted (residents), and, hence, may be justified by non-paternalistic arguments (preventing nuisance), this recommendation could not possibly be justified by any other considerations.

Defending this particular recommendation is a difficult task. Mill and Hart, whose approaches the Committee ostensibly followed, therefore the first to be consulted, both objected to moral paternalism (as opposed to physical paternalism, occasionally justified by Hart). Dworkin, who justified paternalism in certain circumstances, and employed the notion of hypothetical consent in order not to contradict the Millian idea of Autonomy, set prerequisites that would have to be met before legislating a paternalistic statute[66] . Firstly, a heavy burden of proof to demonstrate the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence. Additionally, the nature and cogency of the evidence for the harmfulness of the course of action must be set at a high level. Thirdly, he pursued the principle of the least restrictive alternative. It is doubtful whether these conditions were fulfilled in this case. The nature of the harmful effects on the offender, and the probable consequences of

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[63] Hart, H.L.A. (1963) .

[64] See: Shoham,S.G. and Shavitt,G., (1990) .

[65] Dworkin,G. (1971), at p.107.

[66] Ibid. p.125

social welfare treatment, were not studied thoroughly. The Committee did request a further investigation of prostitution, but made the recommendation anyway. The Committee apparently deemed the harm caused by prostitution as self-explanatory and considered the provision of a social report important enough to justify limitations of liberty. The approach hence seems similar again to Lord Devlin's, regarding moral paternalism as justifiable[67] .

As for adherence to the stated aims, this recommendation clearly went far beyond the aim of clearing the streets and into the questionable realm of protecting the supposedly vulnerable.

The discussion of paternalism is important not only in this particular context, but will become essential regarding the allied offences, principally living on the earning of a prostitute, and later discussions of domestic sexual offences.

ALLIED OFFENCES

Living on earnings of a prostitute

S.30 of the Sexual Offences Act 1956[68] , provides that it is an offence for a male person knowingly to live wholly or in part on the earnings of prostitution, presuming that a man who lives with or is habitually in the company of a prostitute, or who behaves in a way which shows he is aiding, abetting or compelling her prostitution with others, would be knowingly living on the earnings of a prostitute, unless he proved otherwise. S.31 provides the parallel offence for a female, for purposes of gain to exercise control, direction or influence over a prostitute's movement in a way which showed she was aiding, abetting or compelling her prostitution. The similar maximum penalty is two years imprisonment on conviction on indictment.

The Committee recommended retaining the law unchanged, except for a landlord letting premises at an exorbitant rent and an agent knowingly taking part in a prostitute's transaction, who would be deemed to be living on the earnings of a prostitute[69] .

Despite the sweeping legal definition, potentially embracing various relationships between prostitute and her partner, the Committee interpreted the Act as based on the desire to protect prostitutes from coercion and exploitation. Although realising that contemporary prostitutes were less likely to be coerced or exploited against their will, the Committee nevertheless held that exploitation existed, since the real target of it was the "whole complex of the relationship

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[67] Devlin,P. (1959) .

[68] Hereinafter reffered to as 'SOA1956' or 'the 1956 Act'.

[69] See the following discussion of these proposals.

between prostitute and customer"[70] . This struggle to prove that some sort of exploitation indeed existed might have indicated a certain uneasiness with the broad criminalisation, but that was the only sign of it.

The majority found the penalties adequate[71] , without considering the implications of a possible severe punishment on genuine partners. Interestingly enough, the three women members of the Committee disagreed, proposing an increased maximum penalty of five years imprisonment, in order to confront the expected increased commercialisation and exploitation[72].

The Committee realised that the relationship between prostitute and ponce usually stemmed from her need for some element of stability, and that the association was usually voluntary and operated to their mutual advantage, yet considered that "the ponce...has rightly been the subject of universal and unreserved reprobation."[73]

This element attracted the criticism of those who regarded the Committee's approach as too condoning, supporting the reservation that sought severer sanctions[74], and, adversely, those who saw the ponce as serving a useful function, providing the prostitute protection, and companionship[75]. Both Greenland and Fairfield hinted that the contemptuous public attitude must not be justify legal action, although their argument was based on socio-psychological factors and possible consequences rather than on theoretical ones, examined shortly.

The same point served the radical criminologists in their account of the law as creating "Ghettoes", segregating the prostitutes in the struggle for retaining the "normal", by denying them a "normal" relationship, living with a partner[76] .

Even if accepting that this offence should exist, at least where exploitation is involved, it seems that the Committee did not help to define the borders of criminal law intervention. The Report mentioned that the simplest form of living on the earnings of a prostitute consisted of an arrangement by which a man lived with a prostitute and was wholly or mainly kept by her[77] , and later acknowledged other, more complex and indirect arrangements, such as between a prostitute and a car-hire firm, hinting that these should not be regarded as offences[78] .

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[70] The Wolfenden Report, para.304-306

[71] Ibid. para.307

[72] Ibid. at p.128, Reservation of Cohen,C., Lovibond,K. and Stopford,L.

[73] Ibid. para. 302

[74] e.g. G.C. (1957b), at p.625

[75] e.g. Greenland,C. (1961), at p.207 and Fairfield,L. (1958), at p.165

[76] Newburn,T. (1992), at p.53, see explanation of "Getthoeism" in Greenwood & Young (1979).

[77] The Wolfenden Report, para.301.

[78] The Wolfenden Report , para.301,305.

However, a clear guideline as to where the line should be drawn was not suggested. As later judicial cases show, the predicament is often more complicated and left for judicial decision.Was this flexibility, or, rather, ambiguity, intended by the Committee?

However important the details of the offence are, the fundamental question, the one that was nearly ignored by the Committee and implied in certain mentioned articles, is whether criminalisation of this type of behavior can be justified at all.

The relationship between prostitute and ponce clearly subsists in the private sphere. Considering that the distinction between 'public' and 'private' was fundamental to the Committee's declared aims as to the debate about enforcement of morals, how could legal intervention be justified? The Committee's effort to define the exploitation was, presumably, the justification. But, even if this exploitation existed (and exploiting "human weakness" is a rather obscure interpretation), which legal theory could have justified this intervention? Furthermore, could the consent of the 'victim', whether the prostitute or the customer, be ignored? Answers seem to only be found, again, in Paternalism.

The only other plausible explanation is that the ponce's conduct is so repugnant that it is reason enough for criminalisation, that is, pure legal moralism. According to Lord Devlin's approach, since the law exists in order to protect society, including its moral principles, the victim's consent would not deprive the offence of its injurious nature[79] . The explanation for intervention may therefore be the moral wrong, not excluding the "private".

However, this possibility is seemingly ruled out by the Committee's presumption of exploitation. More importantly, its declared underlying philosophy would have prevented it, as it was deemed to be closer to Hart's theory, according to which there must be a standard against which to measure the "harm", apart from the alleged immorality, using this very offence as an example of moralistic legislation[80] .

As long as the Committee did not maintain that ponces threatened the peace and safety of either the prostitute, the customers, or others, as will later Committees claim, the only explanation left is Paternalism. The question of consent becomes irrelevant since legal paternalism, according to Feinberg, "employs the word 'harm' in the sense of simple setback to interest, whether 'wrongful' or not", unlike the principle of harm, to which the sense of 'wrongful injury' applies[81]. Consent would not exempt from liability.

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[79] Devlin,P. (1959).

[80] Hart,H.L.A. (1963).

[81] Feinberg,J. (1986), at p.12-16.

Difficulty in justifying the recommendation may arise from Feinberg's distinction between "hard paternalism" and "soft paternalism". The distinction between the two is determined by the weight of the voluntariness of consent in two-party cases such as the present. While the "hard" option will justify criminal legislation that is necessary to protect competent adults, against their will, from harmful consequences even of their fully voluntary choices, overruling free consent. the "soft paternalism" will only recognise justification to prevent self-regarding harmful conduct when this is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not[82] .

The Committee did not explain why the prostitute's will should be ignored. The perception of the prostitute's "human weakness"[83] may imply the reason for denying her of valid consent, given that it is the weak who should be protected. However, this is just a hint, and it seems to fit better later Committees' viewpoints, those who stressed the element of coercion, which may deny the prostitute of her free will. The conclusion is that Wolfenden's approach is closer to "hard paternalism", which has been rejected, as seen, by most theoreticians whose ideas the Committee purported to follow. The question whether "soft paternalism" is paternalism at all, or just another aspect of the harm principle (therefore valid according to Liberal theory) will become relevant regarding other Committees, especially that of 1982.

Such an approach could have been the consequence of a contemporary belief that "quite a large proportion of prostitutes are mental defectives " that have an "impaired moral judgement" therefore are incapable of pursuing their own good[84] . Cowan's discussion was criticised as "psychiatric nonsense"[85] , but although the Committee did not pursue the psychological analysis, it may still have been influenced by a similar portraits. All the evidence so far has shown that prostitutes were certainly not perceived as capable adults. Categorising prostitutes as not quite capable has undoubtedly facilitated using paternalistic measures, through classifying them in the same inferior legal position of the young and otherwise vulnerable, hence fitting the "special circumstances" that would justify criminalisation.

A later Committee, appointed in 1982, examined the possibility of defining the offence by elements of exploitation and coercion, missing from the existing legislation. This suggestion will be analysed, but as an interim conclusion, it is worth mentioning just to exemplify the different route the Wolfenden Committee could have at least examined had it wished to define an offence more consistent with its supposed theoretical commitment.

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[82] Ibid

[83] The Wolfenden Report, para.306.

[84] Cowan,R. [1956].

[85] Hails,F.G. and Lynch,G.W., [1956].

Premises Used for the Purpose of Prostitution

The SOA 1956 provides in s.33 that it is an offence to keep a brothel or manage it, or assist to manage it. Keeping a brothel has also been an offence at common law. S.34 provides that it is an offence for a landlord or a lessor to let the premises knowingly that they are to be used as a brothel. S.35(1) prohibits the tenant or occupier from knowingly permitting the premises to be used as a brothel, and the landlord may require him to assign the lease to an approved person. A failure may lead to termination of tenancy. S.36 provides that it is an offence for the tenant or occupier knowingly to permit the premises to be used for the purposes of habitual prostitution.

A progressive system of fines and terms of imprisonment sets the maximum penalties.

Similarly to living on earnings of a prostitute, this offence too has been treading on the fine line between effectively prosecuting prostitution and allowing the prostitute some space to lead a normal as possible life, plying her trade in a relatively non-offensive way. An accommodation and a decent working place are surely two basic human requirements. Another similarity is in the potential for exploitation, alleged or real, and the question how far the law should go in protecting the prostitute from it, not forgetting that in limiting the prostitute's autonomy, the law itself may contribute to this exploitation.

The suggestion to institute licensed brothels was rejected because of an alleged connection with traffic in women and children, the undesirable implication that the state recognised prostitution as a social necessity and, finally, a fear that it may encourage men and women to "indulge in promiscuous intercourse"[86] . Contemporaries seemed to agree that licensed houses were unthinkable.[87] Therefore, it is not surprising that the recommendations were aimed at reinforcing existing laws.

For definitions, the Committee referred to precedents which defined a "brothel" as requiring the use of at least two women and held that a room let separately would constitute separate premises for this purpose.

As for "premises used for the purposes of habitual prostitution", the Report endorsed cases that established that the prostitute herself could not be convicted of it, , as this would be equivalent to making prostitution itself an offence[88], and that also applied to a landlord, even if he was the tenant of one part of the premises and sublet another.

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[86] The Wolfenden Report, para.291-297, para.293.

[87] e.g.Hall,J.G. (1958) , at p.175.

[88] The Wolfenden Report, para.318.

Another rejected proposal was to abolish the difference between a "brothel" and "for the purpose of habitual prostitution", reasoning that as long as society tolerated the prostitute, it must let her carry on her business somewhere, the only possibility left being individual premises. These two recommendations imply that the Committee considered seriously the premise of not criminalising prostitution per se, although its effect would naturally be very restricted in an environment criminalising others for facilitating prostitution and where two prostitutes could not work together.

The Committee was aware of "the difficulties experienced by reputable landlords who are anxious to eradicate prostitution from their properties"[89], therefore recommended empowering the court which convicted the tenant or the occupier to make an order determining the tenancy, or requiring the tenant to assign the tenancy to a person approved by the landlord[90] . The landlord himself would be heard, and if he granted a new lease to the same person, he would be deemed a party of any subsequent similar offence unless he could show all reasonable steps to prevent its occurrence have been taken[91] . The rationale was to deter the landlord from dealing with the same tenant, who may pay more.

However, the Committee was also aware of landlords charging exorbitant rent and recommended that such a landlord would be deemed to be living on the earnings of the prostitute, the same applying to any agent knowingly involved in the transaction[92] .

The recommendation was made as an answer to the failure of unsuccessful cases in which prosecution could not prove that the landlord had actually lived on prostitutes' earnings[93] . These attempted prosecutions attested that a need had been felt. The primary ground seemed to have been reproach of the exploiting landlord, and concern for the prostitute's right to live somewhere without being exploited was secondary.

An opposing member of the Committee, Mr. Adair, went even further to suggest extending the presumption of living on earnings of a prostitute to a landlord who was making a business of letting premises for the purpose of their being used for habitual prostitution[94], aiming to strike the landlord who made a business of it while charging high rents that were not exorbitant.

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[89] Ibid., para.321.

[90] Ibid., para.326.

[91] Ibid., para.327. Another recommendation, designed to overcome a technical difficulty, was to empower a court to require the tenant to disclose the name and address of the landlord, and to require that of each lessor in the case of a "chain of leases" (Ibid. para.328).

[92] Ibid., para.331.

[93] e.g. *R.v.Silver*, [1956] 1 W.L.R.281.

[94] Adair, J. The Wolfenden Report, op.cit., at p.123.

The professed task of the law[95], to protect against exploitation and corruption of those perceived as vulnerable, even when it interfered with private lives, could provide theoretical justification in such a private matter. Another factor justifying intervention, besides the vague and hinting-at - morals "corruption", was the real exploitation involved, justifying paternalist intervention, even at its "soft" version, since consent of the prostitute was probably coerced by necessity.

Few comments regarding those recommendations were recorded. It seems that as introduction of licensed brothels was hardly supported, measures taken to prevent premises from becoming brothels were regarded as necessary. Hence, this was the least controversial part of the Report.

It was not until much later that writers such as West suggested that by permitting certain sexual outlets, nuisances, particularly street soliciting, may actually be reduced. Such proposals will be reviewed later.

Procuration

The number of legal provisions concerning various manners of procuration, along with the heavy maximum penalties, all show just how serious these offences have been considered. The SOA 1956 provides that it is an offence to behave in a way which constitutes procuration according to one of many specified variations, from the basic offence of procuration to become a common prostitute, whether by threats, false pretence or force, to more specific types of procuration concerning mental defectives and under age girls, whether to become a prostitute or to have unlawful sexual intercourse[96] . The maximum penalty for each offence is two years imprisonment, except pertaining the offence of an owner or occupier of premises who induces or knowingly suffers a girl (under the age of sixteen) to resort or to be on premises for the purpose of having unlawful sexual intercourse with men or with a particular man, in which case, if the girl is under thirteen, the maximum penalty is life imprisonment[97]. Special provisions encounter the same offences made by the parents or guardian of a girl under the age of sixteen[98], namely, when a close relationship and likelihood of influence exist.

Paradoxically, considering this elaborate law, the Committee noted that the number of actual prosecutions had been negligible, probably following the need to establish some persuasion or influence in order to sustain the charge, while most women who became prostitutes acted on their own free will and needed no procuration[99]. The small number of cases and lack of

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[95] Ibid. para 13.

[96] SOA 1956, s.3,4,21,22,23,27 and 29.

[97] SOA 1956 s.25-26.

[98] SOA 1956 s.28.

[99] The Wolfenden Report, op.cit., para.344.

suggestions for a change, led the Committee to recommend not to change the existing law.

As regarding brothels, there were no disapproving reactions to this part of the Report. This may have been because "the law has always regarded procuration as a particularly vicious crime"[100] and a change was not deemed required, specially given the minuscule number of prosecutions. Furthermore, this lack of objection or interest may indicate an existing consensus, although the Committee generally admitted that an unequivocal "public opinion" had not been discovered[101] . It concurs with the foregoing conclusion that recommendations purporting to protect the vulnerable gained a wide support, indicating a schematic social perception of the vulnerable prostitute and the exploiting surroundings.

The law itself is consistent with the Committee's definition of criminal law's role, inasmuch as it protects under-aged, mentally defective and those subjected to threats, false representations or intimidation, where the question of the validity of consent is clearly irrelevant. As the denial of the wonen's free will constitutes the very rationale of the law in this area, it is compatible with mentioned legal theories, be it "soft paternalism" or "hard paternalism". The questionable protection of the capable will be elborated later.

Refreshment Houses

Unlike regarding brothels, where possible benefits of a more relaxed arrangement had not been acknowledged yet, the Committee was made aware of the opinion that the aim of clearing the streets may be assisted by allowing for the gathering of prostitutes in certain licensed premises contrary to the existing laws. The Licensing Act provided that any holder of a justices' license to sell intoxicating liquor was prohibited from allowing the licensed premises to be habitual resort of reputed prostitutes[102], the Refreshment Houses Act 1860 included a similar prohibition regarding any person licensed to keep a refreshment house[103], local versions were provided in the Metropolitan Police Act 1839 and the City of London Police Act 1839[104] .

As with other allied offences, reaction to gathering of prostitutes in cafes requires balancing between preventing nuisance and respecting human rights, even when this human practises prostitution. The consequent recommendation was to use the statutes only where "the conduct of the prostitutes is such as to give offence to other users of the premises or to neighboring

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[100] Hall,J.G. (1958), at p.176.

[101] See the introduction to the Report: The Wolfenden Report, op.cit., para.16.

[102] Licensing Act, s.139.

[103] Refreshment Houses Act 1860 , s.32.

[104] Metropolitan Police Act 1839, s.44. City of London Police Act 1839, s.28.

residents"[105], when harm to others was likely and justified intervention. However, as the term "to give offence" is unclear and could generate various interpretations, the harm may be so minor as to present the recommendation as mere lip service rather than a genuine attempt to consider both the wish to eradicate prostitution and the not illegal position of the trade.

The Committee certainly recognised the inadequacy of existing laws, but the recommendation was a compromise between approval and abolition, leaving full discretion to the police, without changing the legal situation. Had prevention of nuisance been the sole objective, the reason for retaining the law seems unclear, as other provisions regarding nuisance and breach of the peace could have covered truly offensive conduct. The hesitation of the Committee to recommend more drastic changes may indicate another inconsistency with the declared aims. There was no discussion about the privacy of the place, arguably pertinent to the question whether intervention, relaxed or not, could be justified. A refreshment house may be seen as a borderline case, carrying characteristics of a private place and of a public one. There is a degree of control exercised by the landlord or his representatives, it is not just open for everybody to come in and do whatever they please, as they could more freely do in a strictly public place. It validates the allegedly elusive line between the notions of 'private' and 'public', that can apparently be interpreted in any desirable way.

The recommendation was indeed criticized by G.C., who failed to see the difference between streets and cafes, and regarded the relaxed application of the law as an incentive for prostitutes to exercise a "potent influence for harm upon youthful customers"[106] . The refreshment house is not, according to his argument, a "private" place in the ordinary sense of the word, hence, it should not be excluded from legal intervention. His use of the term 'harm' clearly implied moral corruption, and the emphasis on the age of the corrupted reconfirmed stereotypes that have been fundamental to many of the expressed views in this continuous debate.

Aliens

The last recommendation concerned empowering courts to recommend deportation orders where an alien was convicted of any offence for which the sentence of imprisonment may be awarded, or any street offence[107] . Furthermore, the Committee noted allegations about prostitutes entering marriages of convenience, to become British subjects, but felt unable to recommend anything regarding acquisition of citizenship[108] .

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[105] The Wolfenden Report, para.351.

[106] G.C. (1957b), p.624.

[107] The Wolfenden Report, para.352.

[108] The Wolfenden Report , para.353.

This recommendation reflected the link between prostitution and fears about immigration, mentioned in the introduction. Being probably based on a factual situation, it may seem as a technical necessity. However, it is suggested that it may have also been partially motivated by desire to attribute deviancy to 'the other', not only a stranger but of a different nationality, an inclination that has been directed at ponces even more than at prostitutes. As will be seen, this proposal is supported by similar social perceptions observed in Israel. The portrayal of the offender will, it is submitted, determine whether someone is be likely to be criminalised, and how he will be treated. While here the alienation will probably contribute to less regard of his rights, in other cases (e.g.the customer of the prostitute, the raping husband), a positive image will shape a lenient legal treatment, even if the conduct has been offensive by any standard.

The Customer

The main conclusion so far is that the recommendations repeatedly crossed the borderline between law and morals, by criminalising private (immoral) matters, in circumstances that could not justify it, and, adversely, ignoring certain public conduct where intervention would have befitted the Committee's philosophy.

Perhaps the most blatantly ignored conduct was that of the customer.

The Committee defined its concern as "the manner with which the activities of the prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive or injurious, or involve the exploitation of others"[109]. On what grounds, then, should customers, particularly kerb-crawlers, be excluded? Are they not "associated" with the prostitute? Does not their behaviour cause nuisance? Or is it not plausible that this behavior may be considered "exploitation"?

The Committee was adamant not to criminalise, although realising that "from moral point of view there may be little or nothing to choose between the prostitute and the customer"[110]. Although prostitutes are allegedly the ones who parade themselves more habitually and openly than prospective customers, the Committee previously expressed the opinion that annoyance would usually be general, caused by the presence of a number of prostitutes, disturbing the inhabitants at large[111]. Does not the same rationale equally apply to customers? A gathering of kerb- crawlers may presumably constitute a nuisance just as serious. Furthermore, the customers' demand generates the prostitutes' parade, confronting just one side of the trade

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[109] The Wolfenden Report , para.227.

[110] Ibid. para.257.

[111] Ibid. para.253.

does not seem very logical.

The Committee admitted kerb-crawling was a nuisance[112], but nevertheless rejected the possibility of creating a new offence, basing it firstly on difficulties of proof, and, secondly, on the probability of "a very damaging charge being levelled at an innocent motorist."

Regarding the first argument, it is difficult to see why technicalities (it was not claimed that the offence would be impossible to prove) should prevent necessary legislation. Evidential difficulties serving as a probable facade for other motives will be encountered in this study frequently. The problem of nuisance caused by Kerb-crawlers may not have been as severe as it would become later, but it certainly was serious enough to be presented as an "increasingly prevalent form of solicitation", therefore the motives behind such a brief, unsatisfactory discussion could be questioned.

The second ground, the fear of wrongfully charging an innocent person, is similar to the criticised justification used for not changing the term "common prostitute" into a definition based upon "loitering for the purposes of prostitution", since it may lead to arrests of innocent women[113] . The Committee failed to mention that this fear may be overcome by their suggested cautioning system. The profound similarity appears to be not only in the concern for the innocent, but also in the implication of the prostitute as a second-class citizen, whose rights should not be watched as carefully as others'.

Radical Criminologists saw it as another example of the "hypocrisy in which the law has, typically, dealt with prostitution" [114], harassing the prostitutes while kerb-crawling was not criminalised, excused on grounds of the "unstated license to men to satisfy their `natural appetites', provided the means to that satisfaction is kept out of sight"[115] . Moreover, in this case customers were visible and nevertheless excused. S. Hall construed it as one detail in a broader picture, the exploitation of female sexuality inscribed in the social relations of commercialized prostitution. Thus, it may be inferred that customers not only caused nuisance, but exploited prostitutes (who deserved protection).

Accepting this approach, the Committee's resolution must be interpreted as having been influenced by moral considerations further than admitted. This analysis contradicts the Committee's remark that the customer was ostensibly as morally blameworthy as the prostitute, since he was excused, on the moral level as well as the legal one, while she was not. Needless to say that such a conclusion is not compatible with the Wolfenden Strategy, which did not

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[112] Ibid. para.267.

[113] Ibid. para.262.

[114] See Hall, S. (1980) , at p.10.

[115] Ibid.

allow for moral regulation as such. This stance could also emanate from a view of the deviant as a stranger. When considering the triangle of the ponce, the prostitute and the customer, it is clearly the latter who is likely to be more similar in his social position to the legislator than the other two, a fact that explains the desire not to prosecute him and the fear of wrongful charges.

A similarity was noted between the attitude expressed here and the 19th century Contagious Diseases Act 1900 and subsequent Acts, opposed by the Suffragettes, which subjected the prostitute alone to compulsory medical examinations, although Greenland did not go far beyond the comparison of the discriminatory provisions, or, in this case, lack of provision[116]. Sumner later explained the Acts as basically assuming that the prostitute's conduct was a "matter of gain", while for the customer "it was an irregular indulgence of a natural impulse"[117] , and drew further conclusions, interpreting the double standard of the Act as an expression of gender-related social inequality[118] , a conclusion just as relevant to the present recommendation. The only difference is apparently the overt use of Victorian values in the 19th Century law, in contrast with the facade of equality and underlying utilitarian theory of the Wolfenden report. This rational facade makes the inequality embodied in the report appear even worse.

However, it should be noted that this issue was clearly largely uncontroversial at that time. Even J.G.Hall, who recognised the ambivalent attitude of public righteousness and private indulgence[119], did not stress the point that equalization of the customer's position to that of the prostitute was logically required.

As for soliciting by men, the SOA 1956 provided that it was an offence for a male person persistently to solicit or importune in a public place for immoral purposes[120] . The maximum penalty was two years imprisonment on conviction on indictment. The Committee realised[121] that as the gender of the solicited person was not specified, it would have seemed to apply equally to the solicitation of man by man, to touting on behalf of a prostitute or to solicitation of females by males for immoral purposes. This provision will gain its share of controversy at a later period.

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[116] Greenland,C.(1961) , at p.206.

[117] Sumner, M. (1980).

[118] Ibid. at p.91

[119] Hall,J.G. (1958), at p.181

[120] SOA 1956 s.32.

[121] The Wolfenden Report, para.238.

Conclusions and Assessment

A sociological explanation to the legal reform of the period was offered by Tim Newburn[122] . The lessening power inequalities in society brought a fundamental change of post-war Britain, that meant increased possibilities for the less powerful (women, youth, working-class) which, in its turn, raised visibility of different behaviors and moral values. Secularization was another factor. Newburn argued, similarly to Stuart Hall, that the increasing emphasis on self-control, as shown in the Wolfenden Strategy, was influenced by those changes, and was continued in the legislation[123]. This observation of social changes and their results contributes not only to the understanding of the background to the Report, but also to the comparison that will be made to later developments and to the Israeli situation.

The other side of change is the desire to retain some of the old values, evidently expressed in the recommendations' contradiction to the philosophy. Where prostitutes were concerned, the application of the Strategy confirmed and strengthened existing practices, by adopting a rather punitive policy due to the "visible" and "public" nature of street offences. However, this punitive policy was adopted regarding allied offences, too, an approach that was not always consistent with the Wolfenden Strategy. In many instances, the recommendations appeared to accord with conservative arguments about the enforcement of morals, rather than with Hart's (and Mill's) theory.

It may be said that the overall tone of the recommendations was, unlike the Strategy, orthodox and repressive. It is not surprising, then, to find that the part of the report concerning homosexuality was far more controversial than the discussion of prostitution[124] .

A result of the inconsistencies between the stated philosophy and the actual recommendations was that later theoreticians who examined the report as one of the major legislative efforts in a so-called "permissive" period, dealing with "victimless crimes", concluded that the alleged permissiveness was quite elusive and complicated, even without examining the recommendations very thoroughly. The dominant tendency in the "legislation of consent", according to Radical Criminologists, as exemplified here, was the process of "double taxonomy" in the field of moral regulation, or, in S. Hall's words[125], increased regulation coupled with selective privatisation. The importance of the report was the new disposition, and that alone. The same view was held, apart from Newburn, by Greenwood & Young, who

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[122] Newburn,T. (1992), ch.7.

[123] Ibid., at p.161.

[124] See: Ibid., at p.51.

[125] Hall,S. (1980) , at p.11.

termed the process "Ghettoisation"[126] .

Matthews assessed the prospective effect of the report as "more punitive and repressive measures which were to be directed at a smaller, more manageable and vulnerable population"[127]. The consequences were a simultaneous diminution of civil liberties and an erosion of legal rights, as shown, for example, in the retention of the term "common prostitute", and in the prohibition to gather in cafes.

Criticisms such as Matthews' raise the philosophical question of how to secure individual rights on the basis of a general Utilitarian doctrine, such as the one adopted by the Wolfenden Strategy. Implementation of a Utilitarian approach would cause tension between state intervention and individual rights where punishment is involved, another fundamental issue.

Generally speaking, the Utilitarian philosophy of punishment has emphasised the significance of the state over the individual, who remains secondary to the general interest, opposite the Retributive school that focused on individual guilt, responsibility and justice. Norrie criticised Hart's theory as trying (in vain) to reconcile the predominant role of the state and individual justice, regarding this attempt to retain a liberal outlook within the Utilitarian culture as "a search to square the Utilitarian circle"[128] . This philosophic analysis may explain some of the alleged faults of the report, such as retaining the term "common prostitute", as inevitable consequences of the adherence to the Utilitarian philosophy, just as was the general punitive policy, although it is rather difficult to imagine that the Committee was fully aware of the philosophical implications of its decisions.

However, Norrie gives the key to understanding the philosophical background for later developments, some of which will be encountered, when explaining that in the late 70's - early 80's the consensus broke, and sacrificing individual justice to social well-being stopped to be regarded as the preferred philosophical alternative. Formal abolition of imprisonment in soliciting offences was reached in 1982. Was it a coincidence?

The lack of sufficient ground to exert control in areas of "victimless crimes", was another problem of adoption of Millian ideas, more specifically his definition of liberty, argued by Greenwood & Young[129] . Broader definitions of victims, suggesting another classification of the offences, have been developed only later[130] .

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[126] Greenwood & Young (1979) , at p.158.

[127] Matthews (1986),at p.189.

[128] Norrie,A.L. ,(1991).

[129] Greenwood & Young (1979) , at p.157.

[130] Mainly those relying on social inadequacy and financial coercion.

The inconsistent recommendations may be explained, accordingly, by public urge for legislation, although not justified by the official adopted philosophy, concluding that the Strategy and the recommendations could not have been more compatible than they actually were, if the different behaviours were still to constitute offences, unless another philosophy had been adopted.

The political nature of the process may account for many inconsistencies. The adoption of different views by different parties[131], the obligation to the party and its views, not to a theoretical school. The Committee apparently suffered from the tension between politics and legal theory, perhaps because of its political proximity, possibly indicating that a complete adherence to a jurisprudential theory would always be impossible. The contradictions and allegedly hypocritical concentration upon visible acts sustain Walker's analysis that while voters are mainly interested in freedom from crime, politicians' interest is order[132]. Those two aims are not necessarily compatible. Moreover, as will be clearly observed about following Act, although the seeds are found in the report, a typical political reaction is legislation to increase maximum punishment. This is a response to public outcry, and the main consideration behind it seems indeed to be public satisfaction (hence quiet) even if it does not prove to be successful in serving any other object.

Prostitution and Gender

The last point is that of the prostitute as a woman, the legal effect of gender. The implications of this factor were largely overlooked in the 1960s, but became crucial to later controversies, in every possible aspect, from questioning prostitution itself, through claims of discriminatory provisions (e.g. regarding customers) to the process of sentencing and the effects of the gender on it, with the development of Feminist criminology. All these issues will become imperative to this study.

Yet another question is whether a man is capable of being a prostitute for the purposes of the law. Although the Report recognised that a man may solicit or importune for immoral purposes, the offence was considered pertaining homosexuality[133], while references in the part dealing with prostitution were directed at female prostitutes. It was not until the late 70's that the issue of male prostitution caused concern in its own right.

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[131] See N. Walker(1987) , at p.187.

[132] Ibid. at p.189.

[133] The Wolfenden Report , para.116.

As gender has always been a characteristic of this kind of offence[134], an inevitable consequence of the sexual element, disregard of it will have to be explained. The relative silence following the discriminatory recommendations, mainly regarding kerb-crawling and the term "common prostitute", may be partially explained by women's lack of awareness of gender commitment at that time. The women's movement in Great Britain began to constitute a significant political force only in the early 70's[135], when early significant feminist criminologists writings and research emerged[136]. Radical Criminologists, too, analysed prostitution in the wider context of a struggle for power of the male gender, although their emphasis was somewhat different[137] . Since the emergence of both movements did not occur until later, such responses were not found among the contemporary reactions to the Report, and the later reactions will be reviewed extensively where appropriate.

Another unknown phenomenon at the time were prostitutes' organisations. They, too, will help to bring forward feminist issues.

However, one relevant question in this context, even at this stage, is how can the great concern about women, for which the Report is one example, be explained?

A social explanation to the concern about the family, specially women, in the post-war period was suggested by Newburn[138] . He found that the role and position of women was at the centre of fears brought mainly by the war and its aftermath, such as population decline, the rising number of divorces and illegitimate births, increasing number of working women and revelations provided by American researchers about so-called "normal sexuality". S.Hall added to this list the economic factor, from a Marxist point of view, an economic expansion directed mainly at domestic consumption, that sent a double message to women as they were expected both to stay at home and spend, and go to work, to help paying[139]. The "privatisation" of prostitution was an answer to the proliferation of ideological discourses around "Women's roles". Attention was focused largely upon the importance of the (threatened) monogamous nuclear family, as a destruction, and problems associated with post-war youth. The influence of both these trends on the Report has been noted here, the visible prostitute perceived as threatening the family, and the need to protect the young from her and from her trade. According to Newburn (following Smart), these aims were all achieved through the re-

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[134] See reference to the Suffragette Movement's reaction to the 1900 Act.

[135] Harris,R., (1992).

[136] e.g. Smart,C., (1976) .

[137] See later discussion of feminism, radicalism and liberalism.

[138] Newburn (1992) , at p.162-168.

[139] Hall,S. (1980) , at p. 22.

establishment of male control over one area of female sexuality - prostitution[140] .

The same facts that frightened men, led women to believe they had reached equality, mainly legally and politically, and, to some degree, financially. Therefore, a female struggle was not deemed necessary, a fact that explains a lack of organization and their silence.

In this particular context, a belief in the alleged roots of prostitution may have contributed to the silence. The implication of a structural perception of victimisation, acknowledging the responsibility of the nature of society and social order, and not an alleged inadequacy, will be viewed. It is however noted here as another probable explanation to the mild reactions to the discriminatory recommendations. Greenwood and Young were among those who argued that one problem of the interventionist state in control of deviant behavior is that deviant individuals are viewed as having lost their freedom because of a basic inadequacy[141] . Hints at the Report for an inferior psycho-pathological perception of the prostitute were observed, implying a possible prevailing view, explaining lack of concern.

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[140] Newburn (1992), at p.53.

[141] Greenwood & Young (1979) , at p.158.

LEGISLATION: The Bill and the Street Offences Act 1959[1]

Wolfenden's recommendations concerning prostitution, unlike those regarding homosexuality, were implemented rather quickly, despite controversies. The Government's preliminary views on the recommendations were discussed in the House of Lords by the end of 1957. The Bill was discussed in the House of Commons from November 1958 and the Act came to force on 16 August 1960. Details are given as this relative promptness will become significant when considering later, much delayed, legislative attempts.

The few inconsistencies between the Report, the Bill and the 1959 Act will be deliberated, as provisions that fully adopted the recommendations have obviously rendered repetition unnecessary.

The inadequacy of previous legislative attempts and failed prosecutions was described by the Committee as "making a farce of the criminal law"[2], evoking the questions how the legislation purported to solve the problem, and whether it succeeded in doing so.

Aims

Presenting the Street Offences Bill before the House of Commons for the second reading, the Home Secretary declared that it was designed to clear the streets to the maximum degree possible of what was a nuisance[3] . The Committee's aim seemingly remained unchanged, emphasising the public aspect, as were many of the ways to achieve it. Some of the criticism directed at the Bill was based on a disappointment with this limited and practical intention, the lack of attempt to "get down to the roots of the problem", as pointed one policeman, C. Williams[4]. Ostensibly, this kind of criticism was made by those who were less interested in the theoretical limitations of the criminal law, but it will come to its own later, with the development of social arguments by feminists and radicals alike, which will provide a theoretical framework to this way of thinking.

The same relates to the Act. Despite the wide definition of `street'[5] , the interest was clearly with visible forms of prostitution. As J.G.Hall put it: "What the eye does not see...appears to be the motto of those who support the Act", adding that "the oldest profession has not acquired that

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[1] Hereinafter referred to as 'SOA 1959' or 'the 1959 Act'.

[2] The Wolfenden Report, para.249.

[3] Per MP Butler. Hansard,Parl.Deb.,Commons 1958-1959,vol.598,col.1271-72.

[4] Williams,C. [1959] at p. 206.

[5] SOA 1959 S.1(4).

description without earning it throughout the ages", a grim forecast for legislative success[6]. Mr Butler himself was aware of the risk of driving the profession underground by prosecuting the visible, public aspects only.

Provisions

The Street Offences Act 1959 was the first, and last, major enactment concerned with loitering or soliciting by common prostitutes in public places for the purpose of prostitution, punishment of certain offences regarding night cafes, and punishment of persons convicted of living on earnings of a prostitute. It was applied uniformly throughout the country (England and Wales). It therefore deserves some detailed attention. Since its restricted aim and provisions are similar to those of the Bill, whether adopting Wolfenden's recommendations or rejecting them, attention will be given to the controversial provisions, whose durability and practical success are of special interest, along with their theoretical justification.

The main Parliamentary opposition was led by Mrs Jeger, MP for Holborn & St Pancras, who represented the opinion of many women and several organisations. The strength of the reservations was apparent in the second reading. Even though the Bill went on to the committee stage, the House was divided by 235 (ayes) against 88 (noes), hardly a negligible minority.

Section 1:

S. 1(1) of the Act, perhaps the most controversial, provides: "It shall be an offence for a common prostitute to loiter or solicit in a street or a public place for the purpose of prostitution".

S.1(2) prescribes the graded penalties for this offence, the maximum being imprisonment for up to three months, in addition or as an alternative to a fine, on a third or subsequent conviction. Increased penalties were the main feature of the Bill, followed by the Act.

S.1(3) enables a constable to arrest without a warrant anyone he finds in a street or a public place and suspects, with reasonable cause, to be committing an offence under S.1(1).

The clause implemented the main relevant recommendations. It removed the need for proving annoyance to a passenger or inhabitant, prescribed graded penalties, and retained the phrase "common prostitute", as well as the nature of the offence.

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[6] Hall,J.G. (1958), at p.136.

"Common prostitute"

The rationale that had led the Committee to recommend retention of the term "common prostitute" convinced Parliament. The main reasoning was the need to provide a statutory safeguard for respectable women[7]. However, the retention was heavily criticised by Mrs Jeger and other critics, as resulting in immediate prejudice. J.G.Hall, for example, regarded it as militating against the presumption of innocence, rendering soliciting an absolute offence as a result of this and of the removal of the need to prove annoyance[8] . A subject that would become another central theme in the account has been hinted at, the constant balancing act between practicality of obtaining evidence, bearing in mind the special features of the criminal law, and the presumption of innocence, and how prejudices have tilted this balance.

Despite the criticism, an attempt in the Standing Committee to substitute the words with "any person" was rejected by a small majority, for fear of widening the scope of the Bill to an alarming extent. Even commentators who supported the provision felt that at least a definition was needed in order to reduce uncertainty[9]. Although a possible definition was suggested by the Committee[10] , neither the Bill nor the Act followed the Report on this point. Another assertion claimed that the need to prove purpose may not have been a sufficient check on what appeared to be a dangerous threat to innocent women[11] . This almost overwhelming fear for the 'innocent' (i.e. the normal) has become a regular feature in the debate and demonstrated the fundamentally different social perceptions regarding the involved parties.

Cautioning system

Cautioning by a police officer on at least two occasions before a charge is preferred, was suggested during debate on the Bill's second reading, by the Home Secretary [12]. The administrative system was outlined by the Lord Chancellor in the House of Lords as well as by the Attorney-General in the Commons[13]. A Home Office Circular embodied it, specifying the rehabilitative aim, although it claimed that "the opportunity should not be forced on the new entrants", an approach which may justify the weak and not very helpful measures[14] .

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[7] Hansard, Parl.Deb.,Comm.1958- 59,op.cit., col,1278,1378(similar approach of the Attorney-General).

[8] Hall,J.G. (1959a).

[9] 'The Street Offences Bill', [1959].

[10] The Wolfenden Report, para.260

[11] 'The Street Offences Bill', [1959]. Hansard, Parl.Deb.,House of Comm. Standing Committees,1958-59, vol.4,col.107.

[12] Hansard, Parl.Deb.,Comm. 1958-59,op.cit., col.1274.

[13] Hansard,Parl.Deb.,Lords.,vol.216,col.74-75. Hansard, Parl.Deb.,comm.,vol.604.col.401.

[14] Home Office Circular 109/59, 13 August 1959.

The 1959 Act did not provide any detail concerning the cautioning system. except for the provision for an appeal against the registration of a caution[15]. It is hardly necessary to mention that Home office instructions, unlike legislation, are not available to the general public, and therefore do not carry even a pretence of public knowledge.

The two features that would attract later criticism were this separation of the system from the law, so that it would not become a constituent of the charge, and the failure to propose that the cautioned person would go to a police station and be presented with a name of a welfare agency. had she wished to.

The first ground for the separation of the cautioning from legislation, according to the Home Secretary's explanation[16], introducing the Bill, was the legal consequence of a formal caution in a police station, i.e. the power to arrest a person against whom prosecution would not be proceeded. The second ground was fear of prejudice.

Critics nevertheless foresaw theoretical and practical problems, besides the acknowledged criticisms about prejudice and lack of certainty. Thus, Wood raised questions regarding evidence and police powers, which were the result of the uncertainty about the relations between the statutory (and undefined) "common prostitute" and the extrastatutory cautioning system[17] . Admissibility of previous convictions or cautions constituted the evidential problem. Wood assumed that previous convictions were inadmissible, as use of similar facts to prove a present charge had been prohibited. However, a comparison to the interpretation of the similar term "suspected person", which appeared in the Vagrancy Act 1824, suggested that the courts may, by the same type of reasoning, allow the use of previous convictions or cautions, to prove "common prostitute"[18] . The hazard of prejudice embodied in such admissibility is apparent.

The inability of the cautioned to clear her name and the question of prosecution raise other problems concerning police procedure and practice, such as whether a constable may ignore policy and prosecute. These questions exemplify the problematic nature of unregulated provisions. One practical example of police's difficulties may be found in a dilemma of a constable whose superiors were evidently wrong in assuming a connection between the caution system and the arresting power established in S.1[19] . Wood's reasonable conclusion was that no valid reason existed why the system could not have been written into the Act, and the two functions of reformation and punishment plainly separated.

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[15] SOA 1959 S.2.

[16] Parl.Deb., Commons 1958-59, op.cit., col.1274.

[17] Wood,J.C. [1960].

[18] Ibid.,p.523,526.

[19] 'Practical Problems', [1965].

The register kept by police was another criticised aspect. Although recognition of its danger was expressed in the right of appeal against inclusion of a record, no regulations were made as to the term a record should be kept. Mrs. Jeger declared her fears in the Second Reading[20], and similar reservations were expressed about the Act[21] , but it has not been amended. Could the reason be a perception of those already registered as second class citizens, less deserving of civil rights?

As for rehabilitation, it seems that the emphasis Wolfenden had put upon attempts to rehabilitate young offenders, as expressed in this recommendation and in the recommendation to allow for a social report, were largely abandoned by Parliament[22] , presenting the provision as one more example of the adoption of the repressive recommendations of the Report, without the reformative aspect. Offering the name of a welfare agency was recognised as a poor substitute to the suggested intervention of a welfare worker, supported by MPs who had not believed in successful redemptive measures[23] . This conclusion about the prominent motives behind the legislation is accentuated by comparison to the Scottish system, the acclaimed prototype for the recommendation but which, apparently, made a real effort to advise prostitutes and even assist in obtaining employment[24] . It is interesting that even in a period perceived to be "rehabilitation oriented", this aim took a second place to the deterrence and retribution expressed in this provision as much as in the severer penalties.

Kerb-crawling

Another aspect of the nuisance, Kerb-crawling, was discussed in Parliament briefly. Wolfenden's recommendation was followed, and legislation was not pursued. It was claimed that S.32 of the Sexual Offences Act 1956, had been successfully employed in Nottingham against Kerb-crawlers[25] . Although this stance was not controversial at that time, it is nevertheless mentioned, because of later theoretical and practical reservations, including judicial approach toward prosecutions of men accused of soliciting. As argued in the introduction, ignoring certain issues may be instructional just as pursuing them is.

Cafes and refreshment houses

Clause 2 of the Bill departed from the Committee's recommendations, increasing the penalties, imposed under existing statutes, on proprietors of all-night cafes and refreshment houses and for allowing prostitutes to assemble. Moreover, on a first conviction, instead of on a subsequent

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[20] Hansard,Parl.Deb.comm.,vol.604.col.,1323.

[21] e.g. Wood,J.C. (1960), p.528. Greenland,C.,(1961).

[22] The Wolfenden Report, para.269-270,280.

[23] Hall,J.G. (1959b) , p.302.

[24] Ratcliffe,W.A. " [1959], at p.323.

[25] Hansard, Parl. Deb. Comm. 1958-59,op.cit., col.1300.

one, the court could order the forfeiture of the refreshment house's license and disqualify the proprietor or premises. The Committee had recommended, as seen, just the opposite, to use the statutory provisions only when the conduct of prostitutes caused offence to other users of the premises or to residents[26] .

The difference was, according to T.E.James and D.G.T. Williams, the result of public pressure and strong representations, especially from Stepney. It led to an apparent inconsistency with the purpose of the Bill, since, as the Committee had realised, the aim of clearing the streets may have actually been helped by allowing prostitutes to gather in certain places[27]. Furthermore, the lack of any substantial requirement of annoyance presented it not only as a practical hindrance but as a vindictive and biased provision.

The Act adopted the provision in S.3, later repealed by the Licensing Act 1961[28]. The aim behind later legislation, the Licensing Act 1964, remained similar, and the fines were further increased by the Refreshment Houses Act 1964[29] . The discriminating result of ignoring Wolfenden's recommendation in this case was that prostitutes were not allowed to spend their leisure time in certain places as other people were entitled to do, the Act extending the restrictions to gatherings of prostitutes, not necessarily plying their trade. Any respect for notions of harm or offence was apparently set aside, leaving an unjustified provision.

Interestingly, Sion, who criticised this aspect [30], found that in practice it was the police that followed the recommendations to some extent, by taking action against keepers or proprietors of licensed premises or refreshment houses only when their premises became the haunt of prostitutes to ply their trade therein, while not interfering with inoffensive conduct[31] . This rather more realistic approach of the executive authority, probably more familiar with the streets that are to be protected, adds the practical dimension to the foregoing theoretical reservations.

Living on earnings of a prostitute

Clause 3 of the Bill, contrary to the majority opinion of the Wolfenden Committee[32] , and following the mentioned minority's view, increased significantly the maximum period of imprisonment for a man, living on earnings of a prostitute, from two to five years.

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[26] The Wolfenden Report, para.351.

[27] James,T.E. [1959],at p.205. Williams,D.G.T. [1964],at p.259.

[28] The Licensing Act 1961, S.38(3).

[29] The Refreshment Houses Act 1964, S.3.

[30] Sion,A.A. , (1977), at p.94.

[31] Ibid. p.96.

[32] The Wolfenden Report, para.304.

Parliament raised the maximum punishment for conviction on indictment under S.30 of the 1956 Act even further, to seven years' imprisonment[33] .

In this, the legislation ignored various commentaries, recounted earlier. This provision may be construed as stemming from public contempt and disgrace, for, as seen, the ponce was not regarded then as a threatening or harmful creature. Indeed, Dr. James observed that this change, along with the one concerning refreshment houses, had responded to public pressure[34] . This approach sheds an even harsher light on the severer penalties, as menace would have provided a sounder justification than mere dislike, specially where long terms of imprisonment were involved. A question is cast over the Bill as an expression of a coherent public policy. It hints that purported adherence to a legal theory, such as that of the Wolfenden Report, is less likely to be found in legislation, essentially a political process and, therefore, bound to prioritise political considerations. During discussions of the Bill, Mrs Jager's reservations included the reliance upon severer penal measures (along with lack of any provision dealing with male soliciting and excessive power given to the police). Jager saw a danger of "departing from some of the highest principles of traditional British justice"[35] . The extreme statutory penalties would have been susceptible to the same criticism.

Another reason, suggested by D.G.T.Williams, was the general expectation that the passing of the Act would enhance the likelihood of a growing organised prostitution[36] . However, an assessment of the effect of the Act ten years later, conducted by G. Rose, found that there was little evidence of any considerable increase in commercial exploitation[37] . Considering studies about the negligible deterrent power of sentencing[38], it was unlikely to have been the result of severe penalties, namely, success of the Act. Consequently, the extreme penalty remained while the supposed ground justifying it has proved to be non-existent.

The result was however not only the theoretical drawbacks mentioned regarding the Committee's minority that supported such a change. Even if this fear had been justified at the time, as many commentators and MPs believed, the severity of the penalty was not proportionate to the offence or to the body of offences. It is particularly impossible to justify the two years added to the penalty in the Act, compared to the Bill. Furthermore, since the new measures were disproportionate compared to maximum penalties for other offences set out under the general heading of "Prostitution, Procuration, etc." in the SOA 1956, an inconsistency in the law itself was created. This supports the view that legislation was rooted in

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[33] SOA 1959 S.4 .

[34] James,T.E.(1959) .

[35] Hansard,Parl.Deb.,Comm. 1958-59,op.cit., col.1318.

[36] Williams,D.G.T. (1964) op.cit.,p.258.

[37] Rose,G. (1970) , at p.353.

[38] See Walker,N. & Marsh,C. (1984).

popular morality rather than in any legal theory. As with the provisions regarding cafes and refreshment houses, here too the impression is that human rights have taken a secondary place to some rather obscure public benefit and, worse, mere reproach.

Functional Consequences

Forecasts for success of the Act were not, apparently, abundant. Thus, J.G.Hall maintained that new recruits would not be deterred from joining when very little help was actually offered[39] .

The common criticism, however, expressed the fear that prostitution would go underground, in order to bypass the law. The Lord Chief Justice himself, Lord Parker, criticised the Act during a convention in Canada, claiming that the probable results would be organised prostitution and temptations in the way of policemen[40] . This was thought to have reflected the opinion of many lawyers and laymen alike, although the Act had been then in operation for only a few weeks, so its effects were not yet clear[41] .

It is difficult to claim that the legislation failed because prostitution went underground, since it had never attempted to stop prostitution altogether. However, the Act did not restrict itself to the visible and the public when dealing with living on earnings of a prostitute and with refreshment houses, so an assessment of the practical effects has to consider these off- street activities, and assess whether the Act succeeded in protecting public order and decency, its explicit purposes.

Ostensibly, the Act had the effect of clearing the streets, to which, according to some sources, it took the prostitutes ten years to return, gradually[42]. The number of prosecutions dropped significantly, even though convictions were easier to achieve[43] , suggesting that judging the Act by its own aim, it succeeded. However, later reviews such as that of the 1974 Committee, revealed that prostitution did not decrease[44] .

Getting unequivocal research results is difficult, as statistics may be misleading. G. Rose, for example, mentioned complications caused by the cautioning system to what appeared to be a reduction of court appearances. He further argued that it was not clear how far prostitutes had been kept off the streets, since the revival of clubs had the same effect as the deterrent power of the Act[45] . As a social problem, prostitution was not eliminated or even significantly reduced.

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[39] Hall,J.G. (1959a), p.136

[40] [Oct.1959]*Crim.L.R.*, 681.

[41] Ibid. p.682.

[42] Sion,A.A. (1977) , p.57.

[43] Greenwood,V. & Young,J. (1979) .

[44] The Working Party on Vagrancy and Street Offences, Working Paper.(1974)para. 230.

[45] Rose,G.(1970) .

Two results were nevertheless clear. The first, already mentioned, was the unexpected stability of commercial exploitation, the other was an immediate increase in penalties, specially committals to prison. This obviously backfired, as the law would have to be changed later. abolishing imprisonment. Rose argued that this statistic proved the inadequacy of the cautioning system, supposed to prevent it[46], as discussed. Furthermore, it seems to strengthen the observation regarding the fallacy of the rehabilitation aim.

An assessment

From the outset, the Act has attracted criticism from commentators holding a wide range of opinions. As Greenland claimed, apart from those who opposed the Bill in principle, others who wanted legislation to suppress prostitution realised that the methods proposed were unlikely to do more than mask the problem[47] . The discrepancy between the restricted aim of clearing the streets while nevertheless severely punishing private matters, was largely responsible for this dissatisfaction. The provisions themselves provided another source for criticism, not conforming in many observed instances with "the standard of precision and certainty which is of paramount importance in this field"[48] . Consequently, inevitable importance was to be later attached to judicial interpretation. Furthermore, many of the side effects of the Act, such as conspicuous advertising and soliciting by middle-men, would have had to be dealt with by the courts, in order to determine their legality, in a criticising climate.

As with all legislation, the practical effects were obviously regarded as the important ones, due to political pressure, and were often entangled with theoretical considerations. This is true both regarding the legislation itself, with its inconsistencies between aims and measures, and concerning the criticisms directed at the measures while not quite concluding that the primary aim should have been wider, beyond the streets. The very involvement of the criminal law was rarely questioned or justified, if at all.

In the present context, the significant implications have been for social theory. Notwithstanding the changes made as a response to public pressure, the Act was still valued as taking its form from the Wolfenden Committee's stance, preferring a basis of self-control to state-control as long as the well being of others was not put at risk. (e.g. Newburn[49]) Similarly, the aftermath of the Act supported Radical Criminologists' claim that the real consequence was ghettoisation of the majority of prostitutes by the virtual decriminalisation of off-street activity on one hand,

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[46] Ibid.

[47] Greenland,C. (1961) , p.208.

[48] Wood,J.C. (1960) , p.5.

[49] Newburn, T. (1992)., at p.161.

and broader criminalisation of inadequate street-workers, on the other[50] . Social theories will be elaborated later, but the roots should be traced back to this period. Even if this assessment does not look precise considering the more detailed comparison suggested here, the Act may still look more tolerant when compared to the following judicial decisions.

Furthermore, the Act and its consequences were used by Beaven and Russell as exemplifying the futility of legal control of victimless crimes, following alleged undesirable results such as a public disrespect for the law and the influences upon the police, which had to enforce ambivalent law in areas ripe for corruption[51]. This theory too was developed in the 80's, and hence benefited (or suffered) from a retrospective outlook, but it was firmly based on the immediate reactions to the Act, in Parliament and outside it.

As the law prescribed particularly heavy penalties, the theory behind sentencing policies, undoubtedly one of the distinguishing aspects of criminal law, deserves some attention. It seems that the Committee and the legislator adopted the view of punishment as a goal in its own right. (One possible theoretical basis for a linkage between focusing on street offences and such a penological outlook may be found in Wilson's theory.[52]). However, since this perception of punishment relies on a belief in free will, individual choice and responsibility, others, such as Hood, claimed that a good policy must take into account the social forces which shape and constrain individual ability to exercise choice[53], suggesting that it may be achieved by adopting "soft determinism". The interrelations between social forces and individual choice, one of the main contentions in the debate surrounding the studied offences, have thus related to this aspect of criminalisation also.

The discrepancy between these practices and legal theory, following imposition of unjustifiably severe sentences, is supported by Ashworth and Hough's criticism of constructing sentencing policies on public opinion, inevitably deficient[54]. Furthermore, the authors also challenged the assumption that a severer tariff would win back public confidence in the system[55] , which has been the more acceptable face of arguments supporting all the changes, beyond the political capital to be made.

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[50] Greenwood & Young (1979) , p.161.

[51] Beaven,G. & Russell,K., (1988).

[52] Wilson,J.Q., (1985) .

[53] Hood,R. [1987] .

[54] Ashworth,A. and Hough,M., [1996].

[55] Ibid. at p.785.

JUDICIAL DECISIONS

The substantive law has been changed or developed by judicial decisions, as well as by legislation, even more so as a result of the vagueness of the Act and the controversial elements.

Only directional High court and House of Lords cases have been referred to, somewhat limiting the scope of this review. The reviewed cases are those which either interpreted the 1959 Act in an influential way or those concerned with other statutes, such as the SOA 1956, dealing with the same subject matter. Some earlier cases, several of which had been at the background of the Wolfenden Report, will be discussed briefly in order to give a full picture of the legal situation, and as they are necessary for the understanding of later developments, providing contents to the law where legislation was lacking or missing altogether.. The main interest lies with the more controversial cases, those that allow an insight into judiciary's morals.

S. 1(1) of the SOA 1959

Since the only definition is of a "street"[56] , the other elements of the offence prohibiting a common prostitutes to loiter or solicit for the purpose of prostitution in any street or public place[57] , were left for judicial interpretation.

"Common Prostitute"

A prostitute had been defined in early cases as "a woman offering her body commonly for lewdness for payment in return"[58] , a definition that was adopted. The "offering" element became more broadly interpreted, however, as including both a passive and an active involvement of the woman, thus widening the meaning of `prostitution'.[59]

The prosecution usually submitted evidence of the accused's recent behavior in public, and it was accepted as sufficient if two previous occasions on which she had been seen loitering or soliciting for the purpose of prostitution were proved. The accused could, theoretically, rebut it by claiming that despite the two cautions she was not a common prostitute. This line of defense was however uncommon. Therefore, no substantive judicial discussion of this much criticised term existed[60].

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[56] SOA 1959, s.1(4).

[57] SOA 1959, s.1(1).

[58] *R.v.De Munck* [1918] 1K.B.635.

[59] *R.v.Webb* [1964] 1Q.B.357;[1963]Crim.L.R.644,708. Regarding s.22, 30 of SOA 1956.

[60] Sion,A.A. (1977), at p.75.

Soliciting for the purpose of prostitution

Interpretation of "soliciting" referred to judicial interpretation of the same term as it appeared in the Vagrancy Act 1898[61], considering the meaning to be similar in both Acts[62] . According to earlier cases, the word "solicit" in this connection covered not only spoken words but also various movements of the face and the body[63] , tending again towards a wider interpretation, extending the scope of the law.

An example was given in *Smith v. Hughes*, where prostitutes were held to be soliciting for the purpose of the Act by tapping on balcony railings and on window panes, leaning out of the window or hissing at passers-by in the street and later inviting them to enter the premises, making gestures to indicate price and location[64] . This broad interpretation may be restricted by a demand that the act of the soliciting be recognised by the person solicited, as a dictum of Hilbery J. indicated that solicitation was thus formed.

However broad the interpretation may seem, the courts were reluctant to extend the meaning of "soliciting" to cover advertising for prostitutes. In *Weisz v. Monahan* it was held that soliciting requires the physical presence of the prostitute and the conduct on her part amounting to an importuning of prospective customers[65] . A similar interpretation was used regarding S.32 of the 1956 Act, discussed later. The implications of this decision have been significant, as advertising has nevertheless been perceived as undesirable to the point of criminalisation. Alternatives had therefore to be found in order to subject it to legal control.

The wider meaning given to the provision in some cases may have been interpreted as the courts' answer to criticisms of prostitution going underground or developing new ways of evading the law. The narrower approach adopted regarding advertising was overcome by including it, as will be seen shortly, under the offence of living on earnings of a prostitute, in certain circumstances. It should consequently be asked whether the courts did not actually criminalise most aspects of prostitution, further than had been intended by the legislator.

A street or a public place

A `street' is defined in S.1(4) in a broad way and the definition is not stated to be exhaustive.

In *Smith v. Hughes* , where the prostitutes solicited from a balcony and from behind a closed or

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[61] The Vagrancy Act 1898 S.1(1)(b).

[62] *Burge v.D.P.P.* [1962] 1All E.R.666.

[63] SeeSion (1977) op.cit., p.83

[64] *Smith v. Hughes* [1960] 2 All E.R.859;[1960]*Crim.L.R.* 709

[65] *Weisz v. Monahan* [1962]1 W.L.R.262;[1962]*Crim.L.R.* 179.

half-open window of a house facing the street, the acts were held to be performed in the street for the purpose of the Act[66]. Lord Parker based this interpretation on the mischief rule. the aim of the Act being clearing the streets and enabling people to walk without being molested. It seemingly follows that since solicitation was addressed to somebody in the street, there should be no difference between this case and soliciting standing in a doorway. Hilbery J.. however. based the same conclusion on the fact that the solicited person was in the street. According to this precedent, soliciting from a car may have been caught by the Act, but it should be stressed that it has not been used against kerb- crawlers.

"A public place", on the other hand, was not defined in the Act, nor at common law.[67] Reference to decisions concerning the term in other offences had to be confined to those which coincided with the purpose of the Act. Precedents emphasised the accessibility of the place in fact to the public at large[68] . As the distinction between private and public, theoretical and practical, has ostensibly been of the essence of the Wolfenden Report and following legislation, the lack of any definite borders in this crucial point is significant, perhaps exceeding the usual importance attached to clarity of the criminal law.

Living on the earnings of a prostitute

Removal of prostitution from the streets by the 1959 Act, led, as mentioned, to increased advertising. According to Sion, advertisments appeared in specialized directories, on boards in shops, and brothels advertised in newspapers[69] . Since it was held not to form a way of soliciting, another interpretation was needed in order to criminalise this arguably inoffensive act. S. 30 of the SOA 1956 provided the solution.

The increased maximum penalty, from two to seven years' imprisonment, indicated the seriousness Parliament attributed to the offence. Did the courts strike a balance between the punitive goal and justice in individual cases? This question will become more acute later, when discussing the possible abolition of imprisonment, but the courts apparently espoused this perspective, in enforcing the law severely, stating their contempt[70] and sentencing for five years and upwards, where there was any element of coercion or control over the prostitute, justifying severity[71] .

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[66] *Smith v. Hughes*, op.cit.

[67] *R.v.Morris and others* (1963) 47 Cr.App.Rep.202

[68] Sion (1977) ,p.85

[69] Jones,A.E. [1960].

[70] See Williams,D.G.T. (1964) ., at p.258.

[71] See D.A.T., Commentary on *R. v. Khan* [1969].

Therefore, widening the scope of the offence to catch advertising, not regarded so before, was significant. The turning point was in *Shaw v. D.P.P.*[72] , the controversial Ladies' Directory case. Its later importance necessitates going into some detail. Shaw was convicted at the Central Criminal Court of three offences, namely (1) Common law misdemeanour of conspiracy to corrupt public morals, (2) knowingly living on the earnings of prostitutes contrary to S.30 of the SOA 1956 and (3) publishing an obscene article, an offence contrary to S.2 of the Obscene Publications Act 1959. It was the first prosecution under this 1959 Act, an Act which may provide another proof to the conservative political public pressures of the era, especially in retaining the problematic phrase "to deprave and to corrupt", criticised as assuming a causal connection between obscenity and immoral conduct[73] .

The Court of Criminal Appeal dismissed the appeal and granted a leave to appeal to the House of Lords in respect of counts 1 and 2.

The House of Lords held regarding (1), Lord Reid dissenting, that an offence to corrupt public morals existed in Common Law. This was the most controversial part of the decision, particularly Lord Simonds's assertion that the court had a residual power, where no statute had intervened, to supersede the common law, to superintend those offences which were prejudicial to public welfare[74] . The issue of the relationship between judiciary and Parliament as expressed through adjudicative legislation, with its constitutional implications, will be evaluated later. The present question is whether the silence of Parliament did not actually mean that this type of conduct was seen as not warranting criminalisation[75] . The decision is of interest as far as the Lords dealt with the corruptive nature, although not illegal, of prostitution and, more importantly, as an indication to the judicial approach, the belief that Parliament left some gap that had to be filled, that public morality should be protected from it, the court assuming the position of "a court of morals"[76] . It was widely agreed that the fundamental principle of certainty in the criminal law was under danger of infringement[77] . The Lords' insistence, despite this argument, is another indication to the degree of importance attached to the criminalisation of a conduct which was no more than furtherance of ordinary prostitution.

Regardless of the controversy, the House of Lords applied the offence again in *Knuller* [78], censuring advertisements in a magazine concerning homosexual practices. The similarity in

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[72] *Shaw v. D.P.P.* [1961] 2 W.L.R. 897.[1961] *Crim.L.R.*468

[73] Williams,D.G.T. (1964) , p.260

[74] *Shaw v. D.P.P.*, op.cit.,p.917-918.

[75] *Shaw v.D.P.P.*, comment, (1961)*Crim.L.R.* , 474. Lord Reid in *Shaw*, op.cit., at p.924. M.J.C. (1961) at p.898.

[76] Turpin,C.C., [1961] , at p.145.

[77] M.J.C. (1961) ., p.922

[78] *R.v.Knuller (Publishing,Printing and Promotions)Ltd.* [1973]A.C.435

applying it in cases of sexual practices not favoured by conservative opinion holders was apparently characteristic to the general judicial approach.

Shaw's appeal concerning living on the earnings of prostitutes was also dismissed. However, as to the test for determining it, two approaches were presented. Lord Simonds held that a person might be said to be living in whole or partially on the earnings of a prostitute if he was paid by prostitutes for goods or services supplied by him which he would not have supplied but for the fact that they were prostitutes. He was aware that the test would lead to difficulties about landlords letting premises to prostitutes, but the situation was just unclear regarding suppliers of other services.

This approach was criticised as leading to indirect prejudice against the prostitute in the practice of her work, while the original intention of the 1898 Act had been to safeguard the prostitute from exploiters and bullies.[79] Considering the Act itself, however, it is not clear at all that this earlier aim remained endorsed or even acknowledged. As claimed before, the vindictiveness entailed in the harsh penalties, supported by the absolute lack of any reference to exploitation, indicated that the only aim was the elimination of poncing, a debatable purpose served by any widening of the provision.

Lord Reid, on the other hand, restricted the offence to cases in which the occupation of the accused would not have existed if his customers had not been prostitutes, suggesting the "parasitically" test, which had been the test in the past. Even this narrower approach did not link the offence with any exploitation or coercion. However, as these were not incorporated into the legislation, the court could hardly be blamed for it.

M.J.C. commented that S.30 applied only to men, while S.32, which applied to women, presumably was narrower than "living on the earnings of prostitutes" as interpreted in *Shaw* and even wondered whether the result would have been different had Shaw been a woman[80] . This possible gender discrimination is more apparent in the next issue.

Soliciting by men - S. 32 of the SOA 1956

Section 32 provides that it is an offence for a man persistently to solicit or importune in a public place for immoral purposes. The maximum penalty is two years' imprisonment on conviction on indictment.

Three profoundly different elements from the soliciting offence in S.1 of the 1959 Act appear:

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[79] See, for example, Sion (1977), p.100.

[80] M.J.C.(1961), p.943 . The same reservation is expressed by Sion (1977) , in p.149

persistence, the immorality of the purpose and, lastly, the persons it covers, both those who solicit and the solicited.

"Persistent" was held to mean either two acts of soliciting, to the same person or to different persons[81] , or a continuing act of soliciting[82]. With this wide interpretation, the distinction from S.1 was narrowed significantly.

The required immorality of the purpose was the biggest hurdle before those wishing to apply the provision to men soliciting prostitutes and to middlemen soliciting customers.

The Wolfenden Committee referred to the provision, stating that since the gender of the person solicited was not not specified, it would have applied both to solicitation of males by males, either for homosexual acts or for the purpose of immoral relations with females, and to solicitation of females by males for immoral purposes[83]. In Parliament, as mentioned, the successful application of the provision in cases of men soliciting females in Nottingham was argued against introducing new legislation to deal with Kerb-crawlers. This opinion seems to have prevailed at the time[84] , although it may still be seen as an excuse for inaction. However, the view was challenged by subsequent judicial decisions.

Furthermore, it was argued by Renshaw and Goldrein that the Committee's view was not in accordance with the authorities, since the reported cases arising out of the Vagrancy Act 1898, had been restricted to solicitation by men of men[85] . A possible distinguishing feature between the 1956 Act and the 1898 Act, could be the fact that the heading under the Vagrancy Act was "Trading on Prostitution", while the heading under the Sexual Offences Act was "solicitation by Men". They did, however, mention that if the section had been construed as applying to solicitation between men and women, the court would have had to consider the "immorality" of the purpose, an arguably undesirable duty. The question was easier in relation to solicitation of men by men, since it was construed as parallel to illegal and criminal, for example, buggery. Renshaw and Goldrein called for Parliamentary clarification, a wish that was not fulfilled, even though the situation would have had to be reassessed after the Sexual Offences Act 1967[86] .

Crook v. Edmondson [87] was the leading case dealing with kerb-crawling. Since the act of

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[81] *Dale v. Smith* [1967]2 All E.R.1133,1136.

[82] *Burge* [1961] *Crim.L.R.* 412.

[83] The Wolfenden Report, para.238.

[84] e.g., [1958]*Crim.L.R.* 776, where prosecuting men soliciting women by S.32 was regarded as the reasonable option available. A comparison to the Scotish law helped.

[85] Renshaw, V. & Goldrein,E. (1959) .

[86] Hereinafter referred to as 'SOA 1967'.

[87] *Crook v. Edmondson* [1966] 1 All E.R.833. [1966]*Crim.L.R.* 227.

soliciting was conceded, the Court of Appeal had only to consider the meaning of the words "for immoral purposes". The majority of the judges construed the term narrowly, holding that, for the purpose of the Act, the term meant "such immoral purposes as are referred to in this part of the Act of 1956"[88] , trading in or exploiting prostitution, not including sexual intercourse between a man and a female prostitute.

The decision was criticised, on the ground that even if most cases had dealt with homosexuals, the intention of the 1898 provision had been to deal with ponces living on the earnings of prostitutes who tried to further their earnings by touting. Furthermore, according to Dickey some cases had apparently dealt with clients seeking prostitutes[89] . He additionally questioned the relevance of the moral evaluation of sexual intercourse by a man with a prostitute in 1898, the alleged basis for the court's decision. Leaving the question to the jury, as a matter of fact (as suggested by the dissenting Justice Sachs[90]), would have had the advantage of changing with times and circumstances[91] , a degree of flexibility that would be desirable especially regarding terms such as "immorality", loaded with values and social perceptions.

Another unclear consequence of the verdict in *Crook* concerned males soliciting males for homosexual purposes, since the SOA 1967, decriminalised homosexual acts conducted in private between consenting adults. That could pose a problem if the case would have been followed as requiring the immorality to be illegal, despite the judges' reluctance to generalize[92]. Issues of homosexuality and male prostitution will be reviewed separately.

Lord Chorley introduced Bills into the House of Lords, in 1968 and 1969, proposing to amend the law in line with this criticism, i.e., to remove discrimination between men and women, prostitute and client and heterosexual and homosexual conduct. One of the recommendations was to define "immoral purposes" as including either male or female prostitution[93] . This suggestion would have satisfied opinions such as Dickey's, who believed that it would seem reasonable to class all forms of prostitution as immoral. The commentator in the Criminal Law Review held, similarly, that "unlawful sexual intercourse" simply meant intercourse outside the bonds of matrimony[94] , so they would have been expected to be construed as immoral, too[95] . From the point of view pursued here, while the legal classification of prostitution as "immoral" seems unnecessary and spiteful, and the very use of this term in any criminal law is highly

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[88] ibid., p.836.

[89] Dickey,A. [1969] .

[90] *Crook v. Edmondson* [1966], p.837.

[91] See Dickey,A. [1969], p.544.

[92] Winn L.J. disclaimed giving any general interpretation of the section, and See ibid., p.543.

[93] [1968] *Crim.LR*, 127.

[94] As will be seen, the term has thus been interpreted concerning marital rape.

[95] [1966] *Crim.LR*, 227.

questionable, the erosion of legal differences based on irrelevant distinguishing features would have been welcomed. However, the Bills did not reach the final stage of legislation and the continuous legal discrimination constitutes a central tenet of this chronicle.

The practical result was that prosecutions of customers became rare[96]. The increased nuisance caused by kerb-crawlers, coupled with this lack of action, and the apparently different views held by the courts, Parliament and commentators, were bound to lead to a legal reassessment.

Intermediate conclusions

Judicial determination of the legal scope, by interpretation, was not consistent, but the overall analysis showed distinctive features, much in favour of conservative values, punishing the prostitute and the middleman as severely as possible. An apparent correlation existed between moral culpability and legal treatment, punishing the most contemptible, the ponce, most severely, while the least disgraceful, the customer, escaped unscathed. Furthermore, the fear for the public morality was explicitly acknowledged in reviving the archaic offence of "conspiracy to corrupt public morals". Another aspect of the same judicial approach was the civil granting of injunctions to prevent prostitution on certain premises[97] .

The Act itself, which drove the prostitutes away from the streets, compelled them to rely more on middlemen, who were then penalised by courts. A central argument that has been raised more than once suggested that it only served to drive prostitution further underground, away from the eyes of both police and welfare agencies. A fear was expressed that the judicial approach could lead to total suppression, a criminalisation of prostitution pe se[98] . This, of course, did not coincide with either the restricted aims of the Wolfenden Committee or those of the 1959 Act that professed to have adopted the same basic conceptions.

So far, then, the legal development may be seen as a gradual process, starting with the relatively liberal recommendations of the Wolfenden Committee, through the somewhat more restrictive provisions of the Act, and ending with a repressive approach of the judiciary, further invading the less visible aspects of prostitution.

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[96] Sion,A.A.(1977) , p.92.

[97] e.g.*Thompson-Schwab v. Costaki* [1956]*Crim.L.R.* 126,274.

[98] Sion,A.A.,(1977)op.cit., p.147.

The 1970s

While parliamentary efforts and academic ones had marked the active 1950s and the early 1960s, by the mid-60s the controversy surrounding prostitution seemed to have calmed down. So much so, that it was asked whether the 1959 Act had pushed prostitutes out of sight and out of mind[1] . In a decade, only one article regarding prostitution was found in the main legal literature. This relative silence may be connected to the mentioned success of the 1959 Act in driving prostitutes off the streets, and to the postponement until Parliament finally enacted Wolfenden's recommendations pertaining homosexuality in 1967[2] . By then it seemed that the extensive discussions had exhausted the issue.

Judicial decisions during the 70's were not particularly innovative or controversial, except *Knuller*[3] case, which will be discussed in relation to homosexuality. Otherwise, the courts continued to convict landlords who charged exorbitant rents of living on earnings of prostitutes[4], to impose heavy sentences for exercising control over prostitutes[5] , and convicted managers of massage parlors of procuring a person to become a prostitute[6] .

On the parliamentary level, between 1967 and 1969 three Private Member Bills were introduced in the House of Lords to amend the 1959 Act. They all essentially sought to remove the term "common prostitute", to apply the offence of soliciting regardless of gender, and to narrow this offence by introducing either "persistence" or "nuisance"[7] . All these proposals correspond with criticisms of the Act made in the previous chapter. None of the Bills achieved a second reading. As far as could be ascertained, none attracted much public attention.

Can this time be seen as an incubation period for new forces and ideas? In the 1970s, alongside the established attitudes, new theoretical frameworks emerged, whose influence upon public policy would be noted.

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[1] Wright,M. (1970).

[2] In the SOA 1967.

[3] *Knuller v. D.P.P.* [1973]A.C.435

[4] *R. v. Calderhead & Bidney* 68 Crim. App. Rep.37. The judge's direction to the jury, upheld in the appeal, had been based on a dictum by Lord Reid in *Shaw v. D.P.P.*

[5] *R.v. Jones* [1975]*Crim.L.R.*,179. Commentary at p.180. D.A.T. remarked that the heavy sentence (7 years imprisonment and a heavy fine) conformed to the general pattern, if compared to the case of a man living on the earnings of a prostitute, applying pressure.

[6] *R.v.Broadfoot* [1976]3 All.E.R.753. An offence under s.22 (1) of the SOA Act, 1956.To "Procure" is interpreted according to the jury's common sense.

[7] Home office, Working Party on Vagrancy and Street Offnces, *Working Paper* (1974), para.231-233 (hereinafter cited as H.O.1974)

Home Office Working Party on Vagrancy and Street Offences

The Home Office Working Party was appointed in 1971 to review the law regarding vagrancy and other street offences. The latter were included because of the overlap between the provisions of the Vagrancy Act 1824 and the SOA 1959, and, more importantly, following the rising problem of solicitation by males of females, particularly kerb-crawling[8] . Thus, the Home Office paper could have offered a fundamental review of the existing laws and social situation. However, the Working Party limited itself to reviewing the practical effects of the 1959 Act, without questioning the basic principles recommended by the Wolfenden Committee[9] . As this narrow interpretation of its role meant ignoring not only legal questions, but social problems, which were discussed briefly, without attempting to offer solutions, it was criticised[10] . It also meant that street offences were, again, the centre of the discussion.

The Working Party found that the overall amount of prostitution had not decreased following the 1959 Act [11] . Critics who had claimed that the Act would only drive prostitutes underground, an arguably undesirable result, proved right. Yet, the Working Party adhered to the Act's limited aim of clearing the streets, claiming that a legal change which would permit the prostitutes back would be "extremely unpopular"[12]. Therefore, those findings were largely ignored in the report. It was clear that the criticised[13], limited scope would not generate radical recommendations, which could only emanate from a profound understanding of particular social contexts[14] . By now, socio-political criticism was apparently getting more focused, compared to the previous sporadic social comments which did not constitute a comprehensive theory.

The main criticisms of the 1959 Act included the use of the derogatory term "common prostitute", the lack of any narrowing element such as "persistently" or "nuisance", and the discrimination against the prostitute compared to the customer, especially the kerb-crawler. All these were brought before the Working Party, but it followed Wolfenden's view (and that of the 1959 Act) and dismissed the suggestions[15] . As the arguments were extensively discussed already, it is enough to note the general direction of the Working Party, not diverting from former policies, the lack of innovation and thoroughness clearly indicating a cautious policy. The importance of the Working Party for this study is therefore limited to the evaluation of the

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[8] Leigh,L.H. "Vagrancy, Morality and Decency", [1975a] .

[9] H.O.1974, para. 223.

[10] Leigh, L.H. (1975a) , at p.381.

[11] H.O.1974, para.230.

[12] Ibid. para.223. (Was the "unpopularity" a hint as to the real motive behind legislation, electors' satisfaction?)

[13] Leith,L.H. (1975a) ., p.389.

[14] McIntosh,M. , (1975a).

[15] H.O.1974, para. 234-244

1959 Act's function, and the only new proposal, regarding kerb-crawling. As what may have seemed daringly new in the mid-50s looked timid by the mid-70s, Leigh was apparently right in mentioning in this context the thesis that it is easier to make than to unmake criminal laws[16], however faulty or unjustified legislation has been.

The 1976 Report[17] , altough acknowledging reservations that followed the 1974 Working Paper, did not alter the initial recommendations. Hence, any criticism that had been aimed at the Wolfenden report and the SOA 1959 still applied to both papers.

An additional radical suggestion was that the law regarding street offences be based objectively on keeping public order in the streets, and not focus specifically on activities of prostitutes, as they should not be singled out. This proposal was rejected as it introduced elements of persistence or nuisance and required evidence of the person to whom nuisance was caused, deemed 'inappropriate'. Furthermore, there was, allegedly, no need to extend the law to activities of non-sexual nature[18].

As with the effect of the law on underground activity, the Working Party found that critics had been right in claiming that the cautioning system would not fulfill its object of rehabilitating prostitutes[19] . The other object, facilitating prosecution of recurrent offenders, was not fully successful either, since prostitutes managed to avoid it[20] . The Working Party nevertheless recommended maintaining the system[21] . The reasons included protection of the innocent, and, despite conclusive adverse evidence, its value as a framework in which redemption could be attempted. The Party's inability to suggest any changes in the system which may help to rehabilitate prostitutes, exemplified again the rigid policy making, the difficulty in undoing law even when any expectations were not fulfilled.

As for penalties, the Working Party supported retaining the threat of imprisonment, regardless of complete lack of belief in rehabilitative qualities, and despite a general aim of reducing custodial sentences. Predictable criticism, on economic and other grounds, followed[22]. More reasonable was the recommendation to increase fines in line with the value of money[23]. In all respects, then, disillusionment did not lead to any significant change.

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[16] Leigh,L.H. (1975a) , p.382.

[17] Home Office, Report of the Working Party on Vagrancy and Street Offences (1976). Hereinafter cited as H.O.(1976)

[18] H.O.(1974). para.238-239

[19] Ibid. para. 246.

[20] Ibid. para.248

[21] Ibid. para.249.

[22] McIntosh,M. (1975b) , p.284.

[23] H.O.(1974) op.cit.,para.251-252, H.O.(1976) op.cit., para.77.

Kerb - Crawling and nuisance

Following immense public concern about the considerable nuisance, and sometimes distress. caused in certain areas by kerb crawlers, the Working Party could not possibly reconfirm Wolfenden's recommendation to avoid legislation.

Legislation became particularly necessary after the court had held in *Crook v. Edmondson* , that the element of "immoral purpose" in s.32 of the SOA 1956, was not applicable to intercourse between a man and an approached woman[24], the words 'immoral purposes' must be those referred to in Part I of the 1956 Act. Consequently, the police had no means of satisfactorily fighting this conduct, although some efforts were made to use alternative legislation, particularly regarding using threatening, abusive words, etc. with intent to provoke a breach of the peace[25] , and road traffic legislation regarding obstruction. The Court of Appeal convicted kerb-crawlers of this offence only when girls of 14 had been solicited[26], as such sexual intercourse was not merely immoral but also a criminal offence[27], raising again questions about the seemingly required congruence between immorality and illegality.

Although suggested as a possible solution, the Working Party refused to recommend a statutory reversal of*Crook v. Edmondson* , so that s.32 of the 1956 Act would apply to this situation[28], claiming that the "two years' imprisonment would... be too high for this kind of offence"[29] and that the section was "of 19th century origin".

However, the penalty seems to have been a mere excuse for keeping a separate offence, as the Working Party recommended, later, to lower this maximum penalty, so that punishment would be equal to soliciting by prostitutes, men and homosexuals[30], yet it did not recommend to include kerb-crawlers under this offence. The inconsistent attitude was manifested when s.32 was maintained regarding homosexual soliciting and prostitution[31] .

The 1974 crude proposal was along the lines of a man persistently accosting a woman or women for sexual purposes in a street or a public place in such circumstances as were likely to cause annoyance to the woman or annoyance to the public, such as residents and users of the

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[24] *Crook v .Edmondson* [1966] 2 QB 81.

[25] See the later s.5 of the Public Order Act 1986.

[26] *R. v. Dodd* [1979]66 Cr.App.Rep.87, 43 J.of Crim.,9

[27] Under SOA 1956 ,s.6(1).

[28] A proposal that was raised again by critics of the Working Party. e.g. Leigh,L.H. (1975a) , p.390.

[29] H.O. (1974)., para.264

[30] Ibid. para.278

[31] See separate discussion in the context of homosexual solicitation.

street.[32] The offence is not restricted to importuning from cars. The 1976 Report sustained this recommendation[33], regardless of criticism following its ambiguous wording[34]. Renunciation of a definitive formulation on both occasions may indicate just how ambivalent the Committee felt regarding the real necessity of criminalisation.

Protection of the innocent was the first consideration, and the proposal contained two important safeguards: the requirement of persistency of accosting (which did not exist regarding solicitation for prostitution according to the 1959 Act) and the requirement of nuisance (which did not apply to either prostitution or solicitation by men according to s.32 of the 1956 Act). These elements may serve the purpose of protecting the innocent, but they may well discriminate against the prostitute and the homosexual, by impeding prosecutions. Furthermore, when the suggestion to add those elements to the offence of soliciting for prostitution was made, the Working Party argued that "it would be unreasonable to expect the police... to divert sufficient resources to prove persistence"[35], but did not explain why it would not be unreasonable to expect the police to find evidence regarding kerb-crawlers. It seems that objections to an annoyance requirement remained, particularly , as suggested by Leigh, when evidence was likely to be that of a constable, which would be difficult to rebut, as few members of the public would be willing to give evidence.[36]

It should be noted that despite criticism that getting evidence of annoyance to the public regarding prostitution had been given up too easily, exposing individuals to risk of harassment when there was no public benefit to be gained[37], the Report nevertheless insisted that "to make such a requirement... would be to enact a dead letter"[38] .Would not the same requirement be a dead letter pertaining kerb-crawlers? The Working Party obviously regarded its perception of what was annoying to people as self-evident. This was probably yet another disadvantage of the limited scope of its discussion, not properly discussing whether it was right to stop prostitutes from earning their living when no nuisance was proved.

The Working Party further suggested that the deterrent effect of a first informal police warning would be powerful, as the kerb-crawler "may be a respected member of the community and much more sensitive to the stigma of a court appearance than, say, confirmed prostitute."[39] This exposure of the motives behind the discriminating recommendations evokes doubts. Does not

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[32] I H.O. (1974).para.268

[33] H.O. (1976), para.97-99

[34] McIntosh,M. (1975a).

[35] H.O.(1974) , para.236

[36] Leigh, L.H. (1975) , p.390.

[37] McIntosh,M. (1975b). Honore,T., (1978) , p.138.

[38] H.O.(1976), para.87

[39] H.O.(1974) , para.269.

the suggestion that the police warn first weaken the application of the law, before it has even been enacted? The superior position of customers, compared to both prostitutes and soliciting homosexuals is displayed once more. Even the equal maximum penalty would not help if the law were overlooked by police itself. Could not the homosexual charged with s.32 be just as respectable? If so, why did not the Working Party suggest that he too should be "informally cautioned"? McIntosh anticipated that the new offence would be as little enforced as s.32[40] . Considering the Working Party's own attitude it seems that that would be the preferred policy.

Following the Working Paper it was suggested to introduce an alternative formula for the offence of soliciting for the purpose of prostitution[41] , which would be similar to the Working Party's proposal for a kerb crawling offence. The rationale was that a simple offence could cover both situations. The Working Party's ground for rejection was that there were two different situations that needed two different offences[42] , the alleged difference being the overt nuisance of prostitutes plying their trade, opposite the conduct of the men, which was not prima facie creating a nuisance.[43] This was regarded as "social realism"[44] . The real reason was probably the one implied in the 1974 paper, the customer's respectability against the low status of the prostitute, the wish to prosecute men as rarely as possible, even if the conduct, possibly for political reasons, had to be criminalised.

New Directions - proposed reforms

Until the 1970s, as observed, most criticisms were practical, philosophical, or showed a degree of social awareness not necessarily conforming to a particular theory. The first interpretations of this kind of legislation as class legislation, presenting a socio-political framework, are found in the late 70s. Honore argued that the legislation only affected the working-class prostitute, the street worker, not the middle-class one, working from a house[45] . Honore himself, as others who mentioned the class-bias in prostitution[46], did not analyse the situation further, as would be done by Radical Criminologists, to suggest that the offences had been created on middle-class values (heterosexual, male). Honore's insight may however be seen as a step in this new direction, as previous critics may have hinted at this difference, but did not categorise it in terms of social classes.

Honore's proposed reform, which would allow the prostitute to become a normal member of

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[40] McIntosh,M. (1975b) .

[41] SOA 1959, s.1.

[42] H.O. (1976) , para.88

[43] Ibid. para.88.

[44] McIntosh,M.(1975b).

[45] Honore,T. (1978) , p.138.

[46] e.g. Walters,R. (1979), at p.621. The author was a senior probation officer.

society, exercising yet another non-criminal profession, however despised[47], was based on the view that the right to have sexual freedom and private enterprise should be effective. The unjustified erosion of prostitutes' autonomy and their degradation have been stressed in this account regarding most legislative developments. Honore's suggestions included permitting the prostitute to solicit in the streets or by advertisements, and limiting allied offences to cases of exploitation, extending the caution system to cover annoyance caused by persistent soliciting by both sexes. This proposal is interesting since Honore, unlike H.L.A. Hart and the alleged "philosophical strategy" of the Wolfenden Committee, considered that the criminal law should guide, not be neutral in moral questions, even if no harm was caused[48] . Yet he reached the same conclusions as supporters of utilitarianism. Morality was expressed in his proposed reform in the limitation that the state should not control prostitution, since it should not encourage citizens (i.e. married customers) to break their civil (matrimonial) duties[49]. Going beyond mere permission to practice it, into the realm of controlled prostitution, would be a breach of the law's role to offer moral guidelines. Although his criteria for what the law should enforce were not very clear, its importance is in showing another interpretation of prostitution laws and the wider question of enforcement of morals, not confusing decriminalisation with endorsement.

The view that prostitution became largely understood and tolerated[50] , was not, as seen, expressed in the process of policy making. Even toleration of homosexuality was only adopted to a very limited extent. The meaning of tolerance may be a shift in moral attitudes, but legislation still protected the older ones. An alternative reform was suggested by the Sexual Law Reform Society Working Party Report[51] , which, unlike the 1974-76 Working Party, held that principles should be set for the application of law to sexual behaviour. It interpreted existing legislation as aimed at discouraging all sexual activity except matrimonial. The basic premise was similar to the Wolfenden Committee's philosophy, legal intervention justified by harm or deficiency of free will, but, as the Sexual Law Reform Society stuck to this principle, its recommendations were very different from any previous legislative attempt.

The Society argued that since prostitution were not itself an offence, its surrounding circumstances should not be made such serious offences as in the existing legislation[52]. It seems that this logical assumption had been conveniently forgotten by legislators and committees alike. Consequently, when the Society analysed the law regarding street offences, it noted the acknowledged injustices caused by the term "common prostitute", by the making of a lawful act (prostitution) into an element of the offence, by discriminating between prostitute and customer,

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[47] Honore,T. (1978) , at p.140

[48] Ibid. at p.5.

[49] Ibid. at p.142.

[50] Schofield,M. (1968).

[51] Grey,A. (1975).

[52] Ibid. p.332.

and by removing the requirement of annoyance. The Society, however, went further than other critics of the law, including Honore, suggesting a *general* provision, based on annoyance, injury or nuisance to specific citizens (requiring evidence of the annoyed), that would apply to all persons, and to all forms of overtly indecent or annoying behaviour, whether of a sexual nature or not[53]. As unification of offences will be discussed shortly, it should only be noted that had this proposal been accepted, it would have answered most criticisms made here, but according to the portrayal of the legal situation so far, acceptance would have been unlikely.

The Working Party, as mentioned, was aware of such suggestions but rejected them. When attempting to explain this timidity, it should be considered that only at that time did crime become a major political issue[54]. Consequently, the Working Party might have been acutely aware of the political implications of any radical changes, especially given the growing nuisance of kerb-crawlers. Furthermore, despite social changes approaching equality between genders, permissiveness was not obvious. Research showed that moral opinions of the English people were divided fairly evenly between liberals and conservatives[55]. Promoting a pronounced liberal attitude would have been a political risk.

The most radical reform, decriminalisation, was also proposed, along with de-stigmatisation of soliciting, notably by the newly emerged prostitutes' organisations. According to Walters, the two organisations appeared to follow a class system: PLAN's members being primarily high-class call girls, while PROS's members were working class street prostitutes. That was an anticipated result of the legislation which widened the gap between the two[56]. However, there is no evidence that the Working Party consulted the prostitutes' opinions during its deliberations.

The National Association of Probation Officers too supported decriminalisation of prostitution, since 1978, careful not to imply that prostitution was to be encouraged. Still, it advocated removing the criminal law from the regulation of the activities[57] .

Feminist theory

Historically, the seventies were the decade when a shift took place. It was soon clear that the relative power of men and women had been changing[58]. The gap narrowed, although it still was wide. Heidensohn remarked that women were seen not to be powerful so much as not entirely

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[53] Ibid. p.333.

[54] Bottoms,A.E. (1987).at 242.

[55] Honore,T. (1978) , p.172

[56] Walters,R. (1979) , p.635

[57] Ibid., p.635

[58] e.g. see Honore,T. (1978) ., p.169

powerless[59] , power, of course, being central to the process of definition of crime and criminal law. Women's freedom of choice grew. The new prostitutes' organisations may have not been possible in a less tolerant climate. At the same time, women were convicted of more serious crimes than before and of a greater number. The family institution was ostensibly dissolving with a quarter of marriages ending in divorce[60]. Conventions and morals were thought to have crumbled. The feeling was that the age moved towards "violence and equality"[61] . All these changes were bound to transform public perceptions, the political situation, and legal theory, especially in morally sensitive areas, interlocked with issues of gender and the family.

It is not surprising, then, that a gap in criminological writing was detected, demanding different studies[62]. A year later there was "a growing academic literature" on women and crime[63]. With the currently thriving literature, it should be remembered that it only emerged twenty years ago.

The new found women's liberation led to extremes. Thus, an American author, Freda Adler, interpreted female criminality as part of a new female assertiveness, a position that was, unsurprisingly, criticised by McIntosh as simplistic in its notion of voluntarist terms[64] . McIntosh commented also that the liberation movement was a middle-class movement, while its effect on the working class was unclear. This point will be stressed when assessing feminists' attitudes towards prostitution.

Feminism will become important to this analysis in two respects. First, as a source of theories and research about the behaviour of the law (without asking whether a separatist feminist criminology is desirable), and, secondly, as an organisation of women, that may have accumulated power, consequently affecting the legal situation. The question "whose moral values would have effect?" may well be determined according to changing social powers. It should therefore be established whether there is one feminist moral stance and, if affirmative, what it is.

Of course, women had written about crime, including prostitution, before, and few examples were reviewed. But, similarly to the social theory, they had not fully analysed the significance of gender to legal processes. The author's gender did not appear to have affected the writing in a conscious way. Carol Smart's book[65] was a breakthrough in its basic observation about sexual politics, that prostitution (and rape) could not be understood in isolation from an analysis of

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[59] Heidensohn,F. (1977), at p.392.
[60] McIntosh,M. (1977), at p.397.
[61] Honore,T. (1978) , p170.
[62] McIntosh,M. , (1976b) .
[63] Heidensohn,F. (1977) .
[64] McIntosh,M. (1976a) .
[65] Smart,C. (1976), at p.102

women's position and the attendant sexual mores operating within a given culture.

This assertion is the starting point for an analysis of the relationship between feminism and law in the studied areas. One plausible feminist approach would argue that prostitution reinforces female objectification, since true liberation involves removing sex as the basis for interaction between men and women[66] . Thus, Honore claimed that historically, the male sex did not on the whole regard prostitution with the strong revulsion reserved for pimps and homosexuals, so that only "a rare feminist" thought that prostitution could be suppressed[67]. Furthermore, according to Honore respectable women still viewed it as distasteful, more so because of questions that it might have raised, linking marriage and sale of sex[68], evoked again regarding marital rape.

Honore clearly ignored the fact that legislators, who all but criminalised prostitution, have mainly been male, presenting the situation as much more simplistic than it actually were. As this stance does not follow from the evidence, it seems that Honore's observations may be useful only in confirming the degrees of male contempt that have been embodied in the law, particularly regarding the pimp. Complex female reactions to prostitution will have to be deduced from feminist writings.

Although Smart's prime interest was in criminology, not legal details, certain observations are relevant and edifying[69], specially as an overture to the vast issue of feminist critique and its implications.

Smart located the problem in the sexism and conservatism of the criminological practitioners, showing, regarding prostitution (and rape), that women were discriminated against. She analysed and rejected traditional theories that assumed the origins of prostitution to be in some individual pathology which may be physiologically or psychologically rooted[70], rather than regarding prostitution as a social phenomenon. The underlying double standard was embodied in the view that promiscuous females were unnatural and problematic while males' sexual drive was 'naturally' irrepressible. An apparent influence on this attitude was the Freudian idea of female masochism and passivity, according to which the "unnatural" was determined[71] . The assumptions that homosexuality or promiscuity were pathological forms of sexual behaviour

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[66] Walters,R. (1979), at p.635.

[67] Honore,T. (1978) , at p.132.

[68] Ibid. at p.137.

[69] See: Heidensohn,F. (1977) , praising of Smart for drawing together the criminological literature and developing her own arguments on women and criminology.

[70] Smart,C. (1976), p.80

[71] Ibid. at p.85.

could be seen as little more than moral or culturally relative judgments[72] , as an adequate understanding did not exist. The inevitable conclusion, crucial to this study, is that in the context of prostitution, all those explanations functioned within the legal definition, accepting prostitution as an ill needing remedy. (While a social explanation, adversely, neglected to consider the possibility of individual self-determination[73] .)

The similarity between Smart's analysis and the current legal analysis is evident. Signs for such attitudes were encountered in the distinction between the 'deviant' prostitute and the 'normal' citizens, a perception that will be confronted again. Moral values have remained implicit, but powerful. So has the double standard. It is unclear whether criminological studies affected legislation, but it seems safe to assume that several contributing factors, including the Freudian ideas, prevailed, and led to the same approach being promoted by powerful people (mainly male) ultimately influencing legislation. The conclusions about the legal leniency towards the customer support this assertion.

Essential to this discussion is Smart's view that moral codes and legal statutes originate in a specific structural context, stressing the significance of the distribution of power in determining the form and content of the moral or legal code[74] . The balance between men and women empowered the repression of female sexuality and the amplification of male sexuality. The stigmatisation of the prostitute against 'understanding' of the client is, accordingly, predictable. Could the proposed criminalisation of kerb-crawling be regarded as following a structural change, or would it be more realistic to interpret the inadequacy of the suggestions as demonstrating a persisting basic inequality of powers?

From Smart's proposition that prostitution (and rape) may be construed as mere extensions of cultural attitudes towards sexuality, in particular women, it may be concluded that Smart perceived prostitutes as victims, of both exploitation and social norms. Logically, then, such a moral attitude could not dictate anything short of a legal reform. However, as Smart was not concerned with legal details, proposals for change were not offered then.

Yet Smart's has not been the only possible feminist approach. Her analysis was criticised by another feminist, Mary McIntosh, arguing that the very notion of discrimination was inadequate in contemporary society[75] . McIntosh located the weakness of criminology in its central concern with the criminality of individuals, in a society where the social structure was entirely unequal, where the idea of comparing a prostitute with her client was an absurdity. Although this view

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[72] Ibid. at p.86. And see Vold,G.B. & Bernard,T.J. (3rd ed., 1986) , at p.116, for general criticism of psychoanalitic theory's influence on criminology.

[73] Smart,C. (1976), at p.93.

[74] Ibid. at p.89.

[75] McIntosh,M. (1977) , at p.396.

could have supported a thorough reform, and analogous calls to prioritise social factors will be discussed, McIntosh did not go further than to demand a rethinking of the role of criminal law in society . Alternatively, one may detect here the seeds for a more radical theory, that would urge a desertion of the existing legal system as a weapon in the feminist struggle.

The growth of the feminist movement raised the question whether it had any appreciable impact on society[76]. In this context, besides the formation of prostitutes' organisations, an impact was yet to be seen. Although the base for a feminist legal thinking certainly existed, it had to become more concrete in its legal criticism.

The Importance of new interest groups

The 1970s' formation of interest groups, particularly prostitutes' organisations and women's groups, may have had a long term influence, if not an immediate one. Accumulative power had been recognised as influential earlier on[77] . In this account, distinguishing between different groups, whether political or theoretical, according to their views and aims, became central to the identification of the forces shaping criminal law's borders, including through the use of the term "public opinion", representing a particular, if elusive, group.

A partial model for the creation of criminal law, developed by the American academics Cohn and Gallagher, may provide one theoretical substantiation for this indisputable importance[78]. The model presented this creation through the interaction between the public, interest groups and the legal structure, over issues of public morality, specifically a change in the criminal definition of homosexuality in an American state in 1974, comparable to the present issues in its interest in a sexual behaviour largely perceived as deviant. One factor, media influence, enters the scope of this analysis mainly as far as public positions have been expressed, using newspaper reports to indicate recent trends. Another potential source of influence, that was not mentioned in Cohn and Gallagher's study as a separate group, but is relevant to this one, is academic critique, that may have influenced public and official opinions.

Cohn and Gallagher based their study on the general proposition of Berger and Luckman that a social structure is constructed over time by actors involved, and depends upon shared meaning systems. Interactions lead to the creation of norms and wider systems of legitimation and meaning that justify these norms. The concept of power is central to this theory. First, as social control is the legitimate use of power to control deviant behaviour[79] . Secondly, it was proposed that the distribution of power in society is highly relevant to the creation of norms and

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[76] Ibid., at p.395.

[77] e.g. Honore,T. (1978), p.140, suggested it regarding prostitutes.

[78] Cohn,S.F. and Gallagher,J.E., (1976).

[79] See later mention of Foucault 's theory in the context of marital rape.

legitimation. The powerful determine which norms would rule. In this respect, the model corresponds with the group conflict theory[80], one of several theories analysing the criminal law as a consequence of conflicts in society, which is not dissimilar in its emphasis on political groups to reviewed feminist and radical views. Within a complex society, significant sources of political power exist among segments of the public who do not occupy official positions in the state, thus the potential exists for actors external to the political system to affect creation and application of laws. Cohn and Gallagher's research confirmed that the formation of criminal law may be strongly affected by interactions between public officials, segments of the public organised into potential and actual interest groups, and, occasionally, potential criminals or criminals[81] (as are, arguably, the prostitutes' organisations).

Consequently, the emergence of groups, whether of prostitutes or feminists, may be viewed as an attempt of interest groups to control the legal structure in order to change legal definitions. The feminists' awareness of the significance of power meant that the predicament of this interest group has become more complex. On one hand, they could play a more informed part on the political map. On the other, realisation of their relative powerlessness may lead, as will be seen, to disillusionment with the goal of changing the system. Furthermore, this group has fulfilled a double role, as it has attempted to affect the law and to analyse it, roles that will have to be distinguished. The possible feminists' ambiguity towards prostitution, for example[82] , may mean that despite accumulating power, radical legal changes would not be pursued with the anticipated vigour. This will be verified through the comparison to the pursuit of changes regarding marital rape.

The trigger to normative, and hence legal, changes, according to the model, is an event that creates discrepancy between people's expectations of the law and its perceived actuality.
In the 70s, one example for such an event (although a process rather than an incident) may have been the growth of disturbing kerb-crawling, while the law was helpless, a situation which led eventually to an official recommendation supporting change. Another such an 'event', though more general, were women's changing social conditions, which had not yet affected very much the law in this area, up to the end of the 1970s.

Another aspect is coalition between interest groups, formed on the basis of initial attitudes, those that also form the basis for behaviour and may indicate that the law ought to change. Therefore, a coalition may be seen later between prostitutes' organisations and feminists, a possibly unlikely alliance. Stranger alliances will be viewed regarding domestic violence.

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[80] Especially that of Vold's. See Vold,G.B. & Bernard,T.J. (3rd ed., 1986) , from p.272.

[81] Ibid. at p.231.

[82] Hinted at before, and see later discussion in the context of marital rape.

The relative power of the groups, including those that have become increasingly relevant, such as residents' associations, will continue to be assessed in the following chapters through the effect on the legal process.

As the recommendations of the 1974-76 Working Party were largely ignored, and another committee, with an overlapping and wider brief was appointed as early as 1975, the 1980s will be reviewed next.

THE 1980'S

After the relatively quiet 1970's, prostitution was again on the agenda during the 80's. Awareness of some issues was raised as a result of specific problems and legislative measures, such as massage parlours, kerb-crawling, and the abolition of imprisonment for solicitation by women. The same issues were also discussed as part of profound analysis of the establishment by contemporary social and legal theories, particularly Radical Criminology, expanding feminist literature, and renewed theoretical interest in street crime.

Apart from dealing with current problems, the rise of new criminological and social theories meant that assessments of previous legislative efforts, particularly the Wolfenden philosophy and its consequences, were done under new theoretical frameworks. This trend has continued well into the 90's, with an almost constant analysis attaching major significance to 1960's legislation, and surprisingly little thought being given to later developments.

On the political level, the 80's were the conservative Thatcherite era, a fact whose influence will have to be taken into account.

STREET OFFENCES

Men Accosting Women

Perhaps the most prominent issue of the 80's was that of men accosting women, particularly kerb-crawling. Looking at the analysed landmarks, the process that led to the 1985 Sexual Offences Act[1] had been slow and gradual, leading from the Wolfenden Report, which recognised the problem of kerb-crawlers but failed to recommend legislative measures[2], through the relative silence of critics in the 60's, two failed Private Member's Bills in 1967-1968, the wide but ignored recommendation made by the 1976 Working Party, and culminating with the introduction of a specific offence in the 1985 Act. Other discussed developments included the early Parliamentary certainty that s.32 of the SOA 1956 enabled the prosecution of kerb-crawlers, and the judicial decisions holding that this, in most cases, was not to be.

The SOA 1985, was the first criminalisation of this conduct, with a wide support among very different groups. But did the Act represent a growing Parliamentary and social awareness of the imbalances of previous laws, between men and women, prostitutes and their customers, or was it just a politically motivated measure to quieten the complaining angry residents, a toothless

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[1] Herein after referred to as "SOA 1985".

[2] The Wolfenden Report, para.247,267.

compromise? Was a long standing gap between legislation and legal theories being narrowed? The question is not only of theoretical value, as it has determined the contents of the legislation and its application. An Act that may seem a significant step at a first glace, may prove to be no more than a narrow provision, containing so many safeguards that it is practically unenforceable.

Public concern regarding nuisance and distress caused by kerb-crawlers, growing since the 1970's, did not subside by the beginning of the 80's, as no measures had been taken to control it. On the contrary, lack of legislation, and the rising number of cars since it was first mentioned in the 50's, meant that the phenomenon could spread and worsen, intensifying public outrage[3] .

At the same time, a gradual theoretical interest in the allegedly discriminating law has evolved. Cries for a more balanced law, that would put prostitute and customer on a par were heard[4]. The growing feminist camp regarded male soliciting as terrorising of women[5] , but, unlike the residents' groups, was not concerned with further criminalisation of prostitution. Thus, various lobbies approached the same goal from different angles, a fact that may have influenced the indecisiveness that characterised the legislative process.

As is often the case with ad-hoc legislation, even if it arrives after a long process of official evaluation, especially when the voice of the crowd is as loud as in this case, the Act did not offer a well-thought solution based on a clear theory, but rather a token meant to pass as quickly as possible through Parliament.

Legislative Activities

In July 1975 the Criminal Law Revision Committee had been asked to review, in consultation with the Policy Advisory Committee on Sexual Offences (the first committee to incorporate a significant number of women), the law relating to sexual offences, before the Working Party on Vagrancy and Street Offences submitted its report.

The Committee had issued working papers on sexual offences[6] and offences concerning

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[3] e.g. Hill,J.B. (1983). Hill, a solicitor, describing the extent of the phenomenon, suggested using a bind over to be of good behaviour as an only available solution, a practice used in Nottingham.

[4] e.g. Edwards,Susan. (1982), at 327. The first in a line of articles by Edwards promoting the idea, through a comparison to a receiver of stolen goods. See also quotation of M.P. Kilroy -Silk, there.

[5] Edwards,Susan. (1984).

[6] Criminal Law Revision Committee, *Working paper on Sexual Offences* (1980). hereinafter referred to as CLRC1980.

prostitution and allied offences[7] . However, after the 1984 report on sexual offences[8], the Home Office Ministers asked for a short report dealing specifically with kerb crawling to be prepared in advance of the full report on offences regarding prostitution, the urgency demonstrating the public pressure on the government. It was also the first sign that regardless of the CLRC's thorough analysis, Parliamentary legislative proceedings would be rushed. The Committee, however, issued a report dealing with all aspects of street prostitution and male soliciting[9] , and a later report concerning off-street activities of prostitution[10] .

A Private Member's Bill (with governmental support), roughly based on the recommendations, had been introduced to Parliament and after stormy discussions the process took a somewhat unusual form when the Bill was passed on to the House of Lords to decide on a few matters, a procedure that gained further criticism, mainly from the Lords themselves[11] . Finally, in September 1985 the SOA received Royal Assent, although that only generated further criticism, regarding contents as well as application.

As every Committee and Working Party had suggested a different formula, several formulations were presented before Parliament, and the final provision was, again, different from the preceding ones. It seems impossible and futile to examine every single suggestion without going into unreasonable length. A degree of detail is nevertheless unavoidable, the apparent incapability of reaching an agreed version displaying the sensitivity of this issue, compared to other reviewed subjects. The prolonged discussions may hint at a fundamental dissatisfaction with the criminalisation, despite the professed consensus that existed on the necessity of control.

The principal disagreements were clear from the outset, none of them new to this discussion. Prominent considerations were, firstly, the scope of the offence, whether it should include any behaviour apart from strict kerb-crawling, and, secondly, the need for an offence that would be provable, therefore enforceable, opposite major apprehension for the safety of innocent men, requiring use of as many safeguards as possible. As will be seen, the issues are not entirely separate, the difficulty of proof sometimes purporting to limit the scope of the offence.

The only common element to most proposals were the location, in a street or a public place, the

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[7] Criminal Law Revision Committee, *Working Paper on Offences relating to Prostitution and allied Offences* (1982). hereinafter referred to as CLRC1982.

[8] 15th Report, Sexual Offences.

[9] Criminal Law Revision Committee, 16th Report, *Prostitution in the Street* (1984). hereinafter referred to as CLRC1984 Report.

[10] Criminal Law Revision Committee, 17th Report, *Prostitution: Off-street activities* (1985), . hereinafter referred to as CLRC1985 Report.

[11] e.g. Parliamentary Debates, Lords, 3.7.1985,vol.465,col.1282, per Lord Wigoder. Ibid. col.1290, per Lord Monson.

visibility of the conduct still being the main reason for legislation, the public nuisance, and the underlying attitude toward the customer.

The Scope of the kerb crawling offence

As discussed before, the view of the 70's Working Party was that a formulation of the offence should be wide enough to apply to "accosting for sexual purposes".[12] The recommendation was not restricted to importuning from cars, or to accosting for the purpose of prostitution.

Similarly, the Policy Advisory Committee considered that accosting a woman for sexual purposes in circumstances as to cause her annoyance or fear should be dealt with[13], since a narrow offence would only shift the activity from cars to the streets.

However, the CLRC rejected those suggestions, although the conduct was admittedly socially undesirable, since if brought within the ambit of the criminal law it would either be impossible to prove, or would put members of the public to the inconvenience or embarrassment of giving evidence, or extend the law too widely, or allow police officers to give evidence about other people's reaction to a situation.[14] Accosting for sexual purposes was deemed to be too wide, as it may include "amorous advances".[15] Consequently, the CLRC's Working Paper proposed three offences that would only cover motorists, allegedly the main source of nuisance, including an offence of putting the woman in fear, and an offence of accosting for sexual purposes so as to cause annoyance. The third recommended offence, not unanimously agreed upon, concerned accosting a woman from a car for the purpose of prostitution. An obvious criticism (to which the CLRC had been aware) was that customers would simply solicit by foot[16]. Apparently, the Committee's main consideration in limiting the offence was the difficulty of proof, a valid consideration considering that the law has to function properly, but a curious one when realising that the same difficulties did not deter the Committee regarding proof of purpose for loitering by prostitutes[17] .

The 1984 CLRC's Report recommended, firstly, the offence of using a motor vehicle for the purpose of soliciting a woman for prostitution.[18] The second offence proscribed persistently soliciting a woman for the purpose of prostitution, and the third criminalised soliciting a woman

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[12] H.O.(1974) para.268. H.O.(1976) . para.97-99.

[13] CLRC 1982 Working Party, op.cit., para.3.42

[14] Ibid. para.3.43

[15] Ibid.

[16] e.g. see Editorial, (1984)148 *Justice of the Peace*, 577.

[17] For a criticism along this line see: Leng,R. & Sanders,A., [1983], at p.650. They interpreted the suggestion as limiting the law to cases where the wrongdoer could be identified most easily.

[18] CLRC1984 Report, para.40.

for sexual purposes in a manner likely to put her in fear.[19] After a thorough scrutiny, the Committee clearly considered the conduct of advances for sexual purposes in certain circumstances, not necessarily from a vehicle, to be serious enough to justify legal intervention. Moreover, the third offence could be committed in private[20], therefore could easily be seen as closer to indecent assault than solicitation.

Edwards claimed that it was unlikely that women would come forward to testify[21] . However, this precisely could have been the importance of this recommendation, compared to others. As will be seen shortly, in other instances the consideration of evidence being available actually prevented adoption of certain proposals, at least outwardly. Therefore, in its decision not to attach such weight to this consideration, the CLRC showed not unfounded optimism but a degree of bravery, preferring taking a risk to forsaking legislation. Furthermore, it seems that women would be happier to testify about being accosted for sexual reasons than for the purpose of prostitution, as provided in later suggestions and the 1985 Act.

A small step towards an equal treatment of prostitute and client was made in changing the term "accosting" to "soliciting", as it had been successfully employed in previous statutes.[22]

As for sentencing, the 1984 Report adopted the Policy Advisory Committee's view that the offences should not be imprisonable.[23] This stand was expected, considering that in 1982 imprisonment had been abolished as a punishment for women's solicitation. However, it accentuates the problematic nature of including the wide offence that is closer to indecent assault, regarding which it would be reasonable to expect a severer maximum punishment. The majority of the CLRC itself had thought so in its 1982 Working Paper, concerning the comparable offence of putting a woman in fear.[24]

The final version, in the SOA 1985, included two separate offences. The first, kerb-crawling, could be committed either from a motor vehicle or in the immediate vicinity of one[25] . The second offence was persistent soliciting of women[26], which implemented to a certain extent the CLRC 1984 Report recommendation. Both offences required however that solicitation be made for the purpose of prostitution, and be committed in a street or a public place. In these respects the offences have not only been more restricted, but probably more difficult to prove, as a

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[19] Ibid. para.46.

[20] Ibid. para.49.

[21] Edwards, S. (1984) , p.646,647.

[22] CLRC1984, op.cit., para. 45.

[23] Ibid., para.51.

[24] CLRC 1982, para.3.46.

[25] SOA 1985. S.1.

[26] SOA 1985. S.2.

woman would be reluctant to testify that she was solicited for the purpose of prostitution, possibly degrading implications involved.

This formulation was agreed upon after lengthy discussions in the House of Lords. The main supporter of the wide version was Lord Denning, who moved an amendment that included the words "for sexual purposes", whether from a vehicle or not.[27] His argument was that the law should be principally aimed against men who accosted respectable women, and not those who accosted prostitutes, as implied from the restricted formulation, and that the changed emphasis would enhance the effectiveness of the law. A safeguard would have remained in the required persistence. Denning's supporter, Lord Mishcon, stressed that enacting a provision that would include the term "for the purpose of prostitution" would be passing "half a measure", an ineffective law[28] . However, opposition to this amendment was stronger, led by Baroness Vickers, whose accepted amendments formed the basis for the Act. The winning version clearly attached an overwhelming importance to the fear of incriminating the innocent. An example of the absurd extremes presented by the opponents is Lord Kilbracken's claim that as Freud might have said that all actions had a sexual content, the wider offence would have been extremely all embracing[29].

Although an expansion of the law to cover all sexual purposes is certainly problematic, the question is whether the narrow version, along with the safeguards, did not in fact impair the Act's effectiveness.

Evidence and Safeguards

Difficulty of proof has been previously discussed in different contexts. As seen, controversial proposals to add elements to offences, particularly annoyance or persistence, had been raised frequently, ever since the Wolfenden Committee, professedly seeking to obtain the desired effect of an objective evidence. These suggestions were rejected as the elements would have allegedly rendered the offences inoperable[30] , although they were the essence of the offence and the formal reason for its very being. The current legislation was discussed against this background. Therefore, the inclusion of such elements, far from being technical, not only created discrepancy between offences that should have been similar, it could in fact have a tremendous influence upon the delicate balance between working legislation and a dead letter, between protecting the innocent and preventing justice.

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[27] Parl. Deb., Lords, 27.6.1985,vol.465,col.858-859

[28] Parl. Deb., Lords, 27.6.1985,vol.465,col.865.per Lord Mishcon.

[29] Ibid. col.860.

[30] See regarding soliciting by female prostitutes: The Wolfenden Report, para.252. CLRC 1982. para.3.7,3.8.

Criticisms that were aimed at the 1975 Working Party recommendation to introduce persistence and likelihood of causing annoyance as elements of the offence of soliciting by men[31] were referred to earlier. The corresponding statutory offence of soliciting by a prostitute did not contain any of those safeguards[32] , and the offence of soliciting by men for immoral purposes did not include the nuisance element[33] .

Despite awareness of the significance of difficulty of proof[34] , persistence was introduced in the 1984 Report, regarding soliciting on foot, justified as "men often make sexual advances" and should not be arrested mistakenly[35], although it distinguished between prostitute and client. The CLRC regarded the burden upon the prosecution to prove that the defendant was a prostitute as a parallel safeguard. However, considering earlier critique of the labelling of the defendant and the inadequacy of the cautioning system, the value of evidence given by police officers only, and the fact that this element had been rarely, if ever, contested in court, this view of the CLRC seems at best naive, or even a hypocritical justification for an element that would make proof less obtainable, specially as the Committee had been aware of criticisms of this prejudicial term.[36]

The House of Lords incorporated persistence into the Bill, despite opposition. As regarding the appropriate scope of the law, the danger for the "perfectly respectable" was the paramount argument, frequently mentioned, little thought being given to other considerations. Consequently, the evidence of policemen, which had been considered perfectly professional and sufficiently objective to be allowed as sole proof concerning prostitutes, came suddenly under suspicion of possibly being "over-keen".[37] It is hard to imagine such remarks being taken seriously regarding the less respectable prostitutes, although they would probably have been more exposed to police whims. This "danger" was to be solved by introducing yet another safeguard, transferring the decision to prosecute from the hands of police to the Crown Prosecution Service[38], a suggestion that had been made before the Service started operating. This unprecedented step, interpreted as expressing doubts in the necessity of the offence[39] , clearly corresponded with the other manifestations of extreme hesitation.

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[31] H. O.(1974), para.268. H.O. (1976) , para.97-99.

[32] Street Offences Act 1959, S.1

[33] SOA1956. S.32.

[34] CLRC1984, para.12.

[35] Ibid., para.44.

[36] Ibid, para.18.

[37] Parl. Deb., Lords, 27.6.1985,vol.465,col.863, per Lord Mishcon, who inserted the term "persistent" at the Committee stage.

[38] Parl. Deb., Lords, 3.7..1985,vol.465,col.1282. per Lord Denning.

[39] Ibid. col.1286, per Lord Silkin of Dulwich.

The possibility of committing the offence by a single act, introduced in S.1 of the SOA 1985[40], was the product of Baroness Vickers' amendment. An ostensibly wide net that could embrace many cases, was distinguished from soliciting by female prostitutes by the safeguards that it included. Aware of the contradiction, Lord Glenarthur claimed that there were "slightly different terms" used here, and that it was an honourable compromise[41] . Compromise certainly was, but possibly unjustifiable. As argued, specially regarding the implication that the woman was approached as a prostitute, willing witnesses and successful prosecutions were not likely.

Unification of Offences

Three different types of solicitation have been legally classified: soliciting by women for the purpose of prostitution (SOA 1959), soliciting by male for immoral purposes (SOA 1956, predominantly confined to homosexual solicitation) and soliciting by men of women (SOA 1985). Whereas these acts are, arguably, essentially similar, the law has nevertheless retained substantially different provisions. Unification has been proposed and rejected frequently over the last 30 years.

The committees have refused to acknowledge a qualitative similarity between forms of solicitation. Factual and legal reasonings have been discerned, none too convincing.

In the 1976 Report, the Working Party rejected an alternative version for s.1 of the 1959 Act[42], arguing that a different probability of nuisance required different formulations, as the overt nuisance of prostitutes plying their trade was worse than the conduct of men, which was not prima facie creating a nuisance.[43] The 1982 Working Paper recommended to penalise all soliciting and loitering by prostitutes, but only limited forms of soliciting by customers, implying that the sight of soliciting prostitutes was more offensive than that of customers[44], altough both, whether heterosexual or homosexual, were essentially similar, pursuing an exchange of sex for money[45] . The "general offence" attributed to prostitutes, being differentiated from real nuisance, can hardly be interpreted as anything other than disgust.

Similarly, nuisances caused by homosexuals and by prostitutes were distinguished, the former allegedly involving a greater likelihood of breaches of the peace, being a "general offence" that

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[40] Soliciting in such a manner or circumstances as to be likely to cause annoyance to the woman or nuisance to other persons in the neighbourhood.

[41] Parl. Deb., Lords, 3.7.1985,vol.465,col.1294.(during third reading of the SO Bill)

[42] Along this line Matthews suggested a general offence that would cover troublesome soliciting by any person. Matthews,R.and Young,J.(ed.) (1986). ch.9.

[43] H.O. (1976) , para.88

[44] Lang & Sanders, (1983), at p.651.

[45] Ibid.

"any congregation of males for this purpose is liable to cause"[46], thus justifying retaining the threat of imprisonment in S.32[47] , contrary to the 70's Working Party's recommendation for equal penalties for all soliciting offences[48]. This raises further questions: if sexual advances cause such annoyance, should not any form, regardless of sexual preferences, be criminalised? Does not this CLRC's comment suggest that the reason for the offence is simply public disgust of homosexuality, as Leng and Sanders rightly argued[49], ignoring the consideration of homosexual rights?

On legal grounds, the CLRC declined to create one soliciting offence for female prostitutes and homosexuals, by incorporating s.32 into the 1959 Act, arguing that 'persistence' must be retained regarding male solicitation as a safeguard against interpreting equivocal conduct in a way that would incriminate the innocent.[50] Not a very plausible argument, considering the wide judicial interpretation given to the word "soliciting", which has meant that women's conduct may have been just as equivocal. Furthermore, as mentioned, the term "prostitution" actually provided an inadequate protection. An introduction of 'persistently' or annoyance[51] to the offence of soliciting by female prostitutes, was discarded as it "would considerably weaken the law"[52], endorsing once again the Wolfenden attitude, although the recommendation had been made by a majority of the Policy Advisory Committee. Would not the law respecting customers be just as weakened?

A scale has been effectively created, grading homosexuals as the most disturbing, the prostitutes follow, and kerb-crawlers and persistent clients are perceived as the least annoying. However, did this view represent real levels of nuisance or the different moral faults attached to each of the actors? It appears that the motives detected behind earlier stances, the respectability of the men against the low status of the prostitute, a willingness to criminalise men as rarely as possible, even if an offence would have been created, was equally essential to the 1980's thinking. It seems that the facts that served the CLRC in reaching these conclusions could have equally substantiated the opposite stance: if homosexual activity caused nuisance mainly in public conveniences, then the prostitution nuisance was in fact greater, occuring in the streets and disturbing whole areas. Similarly, the same scant evidence upon which the Working Party's based its view regarding the severity of prostitutes' conduct, led others to believe that the

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[46] CLRC 1982, para.3.35

[47] Ibid. para.14,57.

[48] H.O. (1974), para.264

[49] Leng & Sanders, (1983) , p.652.

[50] CLRC (1984) , para.54.

[51] CLRC1982 , para. 3.7, 3.8.

[52] Ibid, para.21.

customers were actually far more disturbing, at least those of them using a vehicle.[53] Thus, it seems that both facts and legal grounds have been bent to accommodate moral views.

Enforcement of the 1985 Act

The Act was approved by Parliament despite awareness of failure of a similar Canadian law. [54] Furthermore, Russell and Owen had warned, even before the 1984 Report was published, that enforcement of American provisions against clients had more frequently been targeted against prostitutes[55], claiming a general discrimination against prostitutes and legal sexism. As there are more clients than prostitutes, and without them this profession would not thrive, this selective enforcement seems all the more blatant. Furthermore, if the elimination of prostitution was intended, it may be argued that at least technically, enforcement should not be too difficult, targeting sensitive clients. Is failure inherent in these laws following a general reluctance to enforce it? The examined struggling legislative attempts, almost all trying to render the law more difficult to prove, seem to affirm it. The moral validity of a law that is bound to fail is questionable.

Fears that prostitutes and customers would move to less visible places, thus exposing prostitutes to growing exploitation by owners of arcane venues[56], would not have materialised if this assertion were not justified, although Edwards may have gone too far in suggesting that the very existence of the Act led to greater evils caused to prostitutes, even murder, as they could not check the clients properly[57] .

The fate of the SOA 1985 itself supports this suggestion. In just two years it became clear that it was probably "the least used criminal charge on the statute book"[58] but for one other offence. Edwards attributed it to a very cautious prosecution process, dictated by a Home Office Circular[59]. At the same time, the numbers of prosecutions of prostitutes, and of consequent imprisonments due to non-payments of fines, increased dramatically[60] . The discrepancy is too prominent to ignore. Paradoxically, then, the enactment of a long awaited provision has manifested all the previous assumptions regarding hidden motives behind the law. There can be little doubt that the strict evidential requirements of the Act have contributed to this predicament,

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[53] Hill,J.B. (1983). and Edwards, S. (1984) , arguing in p.646 that in reality men usually solicited and women accepted their solicitation, so that prostitutes could not even be blamed for this.

[54] Parl. Deb., Lords, 3.7.1985,vol.465,col.1285, per Viscount Hanworth.

[55] Russell,K.V. & Owen,C. (1984-85), at p.83.

[56] Edwards, S. ,(1985b), at p. 929.

[57] Edwards,S. (1987a). and Edwards,S.(1987b).

[58] Edwards,S. (1987b).

[59] Home Office Circular 52/1985.

[60] Edwards,S. (1987b), at p.1211.

permitting concern for the respectable man to shift the balance. Edwards was right in challenging the emphasis of the Act, as even balanced against prostitutes' rights, some kind of control has been required.

Soliciting by Women

The eminently increased number of convictions of loitering and soliciting for the purpose of prostitution led some to declare that the legal control of victimless crimes was largely a futile exercise[61], while the change reaffirmed the Committee's view that efforts should be made to tighten the law[62], criminalising the customer being the prominent example. The declared aim was to reduce as far as possible the incidence of prostitution, through control of street prostitution, consequently rejecting, as reviewed, suggestions to introduce requirements of annoyance or persistence[63] .

The only suggested change, which took a surprisingly long time to make, the first criticisms being directed at the 1959 Act, was to repeal the adjective "common" from the element of "a common prostitute"[64] . The term was arguably not only offensive, but contradicted the basic principle of due process of law[65] . However, removal of "being a prostitute" was not recommended, as this would allegedly affect the whole administration of the law, because of the link with the cautioning system[66], an untenable reason considering that a reform to the system was to be suggested[67] .

The tension between the prejudice implied in the term "prostitute" and the (negligible) risk of a non-prostitute woman being wrongly accused of soliciting was presented for comment, following Policy Advisory Committee's advice[68]. Critics that supported a coherent legal reform proposed to abandon this "emotionally confusing" concept, and base the law on the harms associated with it[69], an unthinkable proposal in times when the liberal approach seemed to have been all but abandoned. The majority regarded the integrity of magistracy as a guard against prejudice, but, as the essence of the law was the nuisance caused by prostitution, the term was an inseparable part of the offence. The only alternative would have been to require persistence, a

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[61] Beaven,G. & Russell,K. (1988).
[62] CLRC1984 Report, para. 15.
[63] To s.1(1) of the 1959 Act.
[64] CLRC1984 Report, para. 17.
[65] Edwards,Susan. (1983a).
[66] CLRC1982 , para. 3.10.
[67] See following discussion.
[68] CLRC1982, para. 3.13.
[69] Leng,R. & Sanders,A. [1983], at p. 645.

suggestion that had been rejected[70] . On balance between the possibility that the offence would be less effective, due to the introduction of persistence, opposite the allegedly remote prospect of prejudice, the Committee considered that the public at large would prioritise the effective law. Curiously, to support this view, the CLRC resorted to an argument that had been dismissed by the Policy Advisory Committee as unrealistic, the use of the term as a safeguard against mistaken proceedings concerning innocent women[71]. Hence, the recommendation was to leave the offence under section 1(1) of the Act intact.

The undefined fundamental term "a prostitute" attracted criticism. Leng and Sanders raised the undesirability of this ambiguity, since morality thus dictated the illegality to a large extent.[72] As the Committee carefully considered suggestions to remove the term, the debate may have included a review of the long serving judicial working formula. However, of all the problems this seems to be the slightest, as, notwithstanding the principle of certainty of the law, the term has not caused much controversy over the years.

Removing the term "common" while leaving the cautioning system would arguably mean little, as prejudice would still be conceivable, since the existence of previous cautions will have been known. The faults of the cautioning system have been commented on repeatedly[73]. Its doubtful value as a safeguard against wrongful conviction, its role in facilitating convictions, and its ineffectiveness in reforming prostitutes (and even counter-productiveness, according to the Policy Advisory Committee, following the delays in being brought before the court), all these considerations had been brought again before the CLRC, that also repeated the Vagrancy Working Party's observations regarding the ways prostitutes bypassed the system. Furthermore, the abolition of imprisonment raised the question whether there should be a cautioning system for a non-imprisonable offence[74] . Eventually, the vast majority of the CLRC members recommended the abolition of the system in its present form.[75] As a safeguard was still available, the other function of the system, facilitating convictions, was not regarded as satisfactory enough to justify retention.

Abolition of imprisonment regarding soliciting by prostitutes

Imprisonment of female prostitutes was intended by the Wolfenden Committee to deter and

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[70] CLRC1984 Report, para. 18-20.

[71] CLRC1984 Report, para.22, and see CLRC1982 Working Paper, para. 3.13.

[72] Leng,R. & Sanders,A. [1983], at p.645.

[73] e.g. Russell,K.V. & Owen,C. (1984-85), at p.86. They found discrimination against the prostitute in every stage of the system.

[74] CLRC1982 Working Paper, para. 3.16-3.20.

[75] CLRC1984 Report, para. 25.

divert more prostitutes toward the probation service.[76] As seen, the recommendation was immediately met with wide criticism, based either on realistic acknowledgement that short sentences of imprisonment would achieve nothing, on disapproval of the implied rehabilitation chances, or on fear of growing underground activities and exploitation.

The twofold attack, that would eventually lead to abolition, was presented. On the practical level it was asked whether imprisonment achieved any aims and at what price, while justifications, or alternatives, were required on the theoretic level, incarceration, as the harshest presently available penal measure, being an almost inevitable starting point to discussions about justification of punishment.

Despite criticism, S.1(2) of the SOA 1959, adopting the Wolfenden Committee's recommendation, prescribed graded penalties for soliciting offences, the maximum being imprisonment for up to three months, maintained for over twenty years.

The 1974 Working Party supported retention of the threat of imprisonment[77] , despite a complete lack of belief in its rehabilitative qualities, and in awareness of a general aim of reducing custodial sentences, claiming that the risk of losing the effect of deterrence on the young was greater than the possible gain. This naturally attracted criticism[78] . The issue represents a general process that has occured in criminological penal thinking. As deterrence, along with rehabilitation, was losing its persuasive power, imprisonment could not have contributed much to reducing prostitution, requesting another explanation for the recommendation. The Working Party's decision may be analysed in light of the aforementioned declaratory theory, the belief in the expressive function as justification for penalising offenders[79] . This argument is very similar to another that will be elaborated in later discussions, mainly regarding feminist jurisprudence, the symbolic aspect of legal denunciation. Imprisonment certainly reflects a greater degree of condemnation than fines. Furthermore, theoreticians like Feinberg claimed that fines do not have any 'reprobative' function, and although this approach was opposed by Walker, he nevertheless admitted that they were a less emphatic symbol than a prison sentence.[80]

This was one of the scrutinised issues in later critiques of the Wolfenden Report as a turning point, adding to the reasons for disapproval of imprisonment. As the Committee had admitted

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[76] The Wolfenden Report, para. 277

[77] H.O. (1976) , para.93.

[78] See previous mention of McIntosh,M. (1975b) , p.284. and : Edwards,S. (1982), at p.326 Edwards reviewed the bodies that opposed imprisonment, including the Association of Probation Officers and M.P.s, and those supporting custodial sentences, although Edwards created the impression that the Working Party supported abolition, while it definitely had not.

[79] Walker, N. (1981).

[80] Ibid. at p.113.

that a resulting increase in exploitation would be plausible, the Radical criminologists interpreted it (in late 70's and early 80's accounts) as fitting the new business moralities of the period, of which the call-girl prostitute became an "informal but institutionalized support", another proof to the "double morality" argument[81]. However, the conservative political power in the early 80's meant that business oriented thinking, on one hand, and a more conservative set of morals, on the other, were advocated. It was presumably an ideal climate to retain restrictive and punitive provisions, yet it was only then that imprisonment was abolished. How would have the radicals explained this development?

On the practical level, the conditions in prisons were on the agenda as a result of overcrowding, along with the financial cost[82] . This crisis appears to have led to the eventual quick Parliamentary amendment. The overcrowding as threatening the maintenance of law and order, and the consequent need to ensure custodial sentences regarding violent and dangerous offenders, were repeatedly raised by the Home Secretary and other MPs[83] . The political angle gained importance following soaring crime figures, while the government was reminded that an important part of its 1979 campaign, which brought its election, had centered around promises to restore "a greater measure of law and order"[84] . Restricting imprisonment sentences to violent crimes would have at least created the impression that something was done, that the justice system would concentrate on seemingly "important" issues. May it then be assumed that the denunciation of prostitution was weakening, or was it simply the result of a political calculation?

Since 1980, two private member Bills that suggested abolition of custodial sentences for soliciting were introduced in Parliament and withdrawn. Only in 1982 s.71 of the Criminal Justice Act 1982, finally substituted s.1(2) of the SOA 1959, imposing fines.

Even then the amendment was not fully supported by all concerned. Nearly half the members of the CLRC, that gave its recommendations concurrently, supported imprisonment of persistent offenders. Moreover, the Committee was aware that realistically abolition would not be absolute as default of paying fines would lead to imprisonment[85] . This result would have been made even more likely by another CLRC's recommendation, to abolish differential maximum punishments and to impose a higher level of fines on all soliciting offences, irrespective of previous convictions[86] . The future unavailability of community service order, another consequence of the abolishment, was largely overlooked. This is hardly surprising considering

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[81] Hall,S. (1980), at p.13

[82] Edwards,Susan, (1982) .

[83] Parl. Deb., Comm., 20.1.1982,vol.16,col.298. per Mr Whitelaw.
Ibid. col.302, per Mr Hattersley. col.311 per Mr Gardner.

[84] Ibid. col.316. per Mr Grieve.

[85] CLRC 1982 , para.3.26-3.30

[86] Ibid. para.32.

the general disappointment from rehabilitative alternatives to incarceration. but is still another indicator to the secondary importance of liberalism.

Edwards, who questioned the "liberal" nature of abolition, nevertheless regarded the change as a sign that "the tide was slowly beginning to turn"[87]. However, at that stage already Edwards[88] and the National Association of Probation Officers[89], encountered the predictable problem of imprisonment following unpaid fines. Furthermore, Edwards foresaw injustice in the discrimination that would imprison poor prostitutes while not affecting the wealthier[90]. As the CLRC, and Parliament[91] , were aware of the these probable consequences, Parliament's step was presumably not influenced by a changed attitude towards the prostitute. but by a pragmatic need, which brought an impromptu, shortsighted solution, and did not entail a policy plan to avoid this undesired development. Parliament obviously wanted to reduce prison population and silence the opposing parties without realising the law would inevitably be inconsistent and may fail, as prostitution would grow.

The actual sentencing pattern would have eventually been set in court, and soon after the abolition, Edwards found that magistrates were imposing far heavier fines where habitual prostitution was evident[92] , sometimes absurdly high[93] . Furthermore, following a sharp increase in the number of women prosecuted for the offence[94] , imprisonment has increased further[95] . The sentencing policy obviously indicated not only a judicial tendency, but the inadequacy of Parliamentary guidance, which left little or no alternative, as the only option. probation, has been costly and questionable, while discharges have not often been appropriate.

The CLRC mentioned in its 1984 report that the substantial increase in imprisonments in default of fine payments had been as much as four times compared to 1982[96] . Magistrates themselves were faced with the dilemma that a modest fine would be derisory to the residents, while a substantial fine would lead to undesired and ineffective prison sentences[97] . Matthews mentioned

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[87] Edwards,Susan. (1983c) .

[88] Edwards,Susan. (1983b).

[89] In a letter to Under Secretary of State, D. Mellor, as cited in "Notes of the Week" (1984)148 *Justice of the Peace*, 577.

[90] Edwards,S. (1983b), p.538.

[91] Parl. Deb., Comm., 20.1.1982,vol.16,col.352.per Mr Parris.

[92] Edwards,S.(1983b).op.cit., p.538.

[93] Edwards,Susan. (1984).

[94] Edwards,Susan. (1985b) .

[95] Edwards,Susan. (1987b).

[96] CLRC 1984 Report,para 33.

[97] Campbell, J.Q. , (1984). Mr Campbell was a Metropolitan Stipendiary Magistrate.

a magistrates' attempt to overcome this by binding prostitutes over to be of good behaviour[98], but this certainly did not solve the basic problem. Essentially, then, the abolition has been bypassed, sentences of imprisonment being imposed indirectly.

Calls for reinstating sentences of imprisonment, at least regarding persistent offenders[99], hence seem not wholly outrageous. However, Mr Campbell ignored evidence that although imprisonment had been previously directed at persistent offenders, it had failed. Restoring it would not necessarily solve the problem. He may be right in arguing that the removal of the sanction made the criminal process in this type of case largely irrelevant, but a plausible conclusion may support a radical alternative. Such an alternative was not, however, outlined by those opposing both the current situation and restoring imprisonment sentences.

ALLIED OFFENCES

Although public attention focused on the proposal regarding kerb-crawlers, assisting and profiting from the prostitution of others were encountered in the 1982 Working Paper and in the 17th Report, restricted to off-street activities[100], and this first extensive effort since the 50's should not be overlooked.

The Committee stated that the general aim of the law was to minimise the nuisance caused by the practice of prostitution and to keep exploiters under control[101] . Although not dissimilar to statements made by previous committees, some changes were nevertheless suggested, the more daring of them concerning different ways of exercising control over prostitutes, and it appears that extremer alternatives had been presented to the Committee.

The evoked issues are very different to those of street offences, exploitation rather than nuisance being the professed motive. Even writers who supported relaxing certain laws regarding prostitution, required a review of legislation of allied offences, given the ongoing exploitation, specially in the wake of the SOA 1985. Edwards, for example, mentioned the low number of prosecutions for procuration[102] , supporting the want to legislate anforceable laws.

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[98]Matthews,R., (1986)ch.9.at p.191.

[99] Ibid.

[100] CLRC 1985 Report.

[101] CLRC 1982 Working Paper, para.1.14.

[102] Edwards, S. (1985b), at 929.

Living on earnings of a prostitute

The current offence of living on the earnings of a prostitute[103] was criticised as stretching the ordinary language to extremes, as the courts held that almost any case where exorbitant fees were paid was theoretically within the limits of the offence, sometimes if fees were not exorbitant[104] . The incoherent situation was made worse by cases in which the accused had been paid by customers and not by the prostitute. Similar criticisms were mentioned earlier, especially regarding*Shaw* [105] and its implications.

The CLRC[106] commented on the anomaly created by the scope of the provision directed at a man living on the earnings of a prostitute[107], wider than the offence of a woman exercising control[108] , while yet another provision covered living on the earnings of a male prostitute[109] . It seems only reasonable that if legal equality between men and women is pursued, it should include this aspect, just as the justification for the multitude of offences concerning soliciting has been questioned.

The prominent criticism was that the criminal law failed to identify what ought to have been its main thrust, the prohibition of organised prostitution[110] . Under s.30, controlling the prostitute is only a way of proving living on her earnings. The great majority of commentators concurred with the CLRC that a change, emphasising the real problem, was needed.

The question was where to draw the line and how to formulate the new offences. Suggestions such as that of Leng and Sanders', to define an offence in terms of coercion and exploitation, were rejected, and the final recommendations seem to justify their claim that any other formulation would be either wider than the target or too narrow, missing types of behaviours deserving punishment[111]. At least one problem, regarding enforcement, was recognised by the CLRC as likely, even if the law changed according to its recommendations[112]. Decisions as to priorities could obviously not be avoided by the police, but through its recommendations the Committee made its own prioritising in the balance between the nuisance caused opposite imposing morals and the difficulty of proof.

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[103] SOA 1956, S.30.

[104] CLRC 1982 Working Paper, para.2.3. CLRC 1985 Report, para. 2.5.

[105] *Shaw v DPP*.

[106] CLRC1982 Working Paper, para.2.4. CLRC 1985 Report, para.2.6.

[107] SOA 1956, s.30(1).

[108] Ibid. s.31.

[109] SOA 1967, s.5(1).

[110] CLRC 1985 Report, para.2.7.

[111] Leng,R. & Sanders,A. [1983] , at 645.

[112] CLRC 1985 Report, para.2.8.

Concerning the appropriate scope, the renewed discussion raised again criticisms that male members of the prostitutes' household should not be penalised just for living with them[113]. This may be a good example of inappropriate legal intervention with conduct considered immoral but that is not necessarily harmful (except for the doubtful "corrupting influence"), the dilemma that is the essence of this discussion. Accordingly, merely taking the lack of coercion or corruption as a mitigating factor in the sentencing stage[114] is an unsatisfactory situation.

The duality of the ponce's roles in the prostitute's life has been recognised ever since the Wolfenden Committee's observation that the relationship usually answered her need for some element of stability, and that such associations were mostly voluntary and operated to the parties' mutual advantage, yet, they thought that the ponce deserved universal, unreserved reprobation.[115] Only now was the law in this area reevaluated and found to be faulty. Therefore, it is not surprising that the CLRC mentioned again the ponce's double function: a source of both potential harmful influence and emotional and social support[116] . Furthermore, the Committee regarded the definition in s.30 as implying that the rationale was simply that this was a disgraceful way for a man to get his living or part of it.[117]

Although recognising the obvious drawbacks of an offence that would penalise the "parasite", theoretical (i.e.penalising the possibly only human relationship in the prostitute's life) as well as practical (i.e. difficulties of proof)[118], and although the recommended new offences would have covered all cases where any coercion or control were used, some of the CLRC's members (and the majority of the Policy Advisory Committee) still supported the retention of the offence of living on the earnings of a prostitute. The ground was the perceived value of an offence which would facilitate the severing of the relationship between a prostitute and her ponce[119] , a stance theoretically justifiable only by moral-emotional justifications. On the practical level, too, the reasoning that this provision helped prostitutes to be rid of their ponces was not convincing, given the general reluctance to turn to the police even when abuse and coercion were involved, if this aim should have been pursued at all by criminal law. Even if the offence was to be fairly minor, a sentence of six months imprisonment[120] , along with the very criminalisation of the conduct, are not things that can be easily ignored.

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[113] Edwards, S. (1985b) , at p.929

[114] e.g. in *R.v Dixon and Dixon* (1995)16 Cr.App.R.(S)779, where the 30 months sentence was held to be manifestly excessive due to the lack of these factors and reduced to 18 months.

[115] Wolfenden Report, para.302.

[116] CLRC 1982 Working Paper, para. 2.5.

[117] Ibid., para.2.18.

[118] Ibid., para.2.20.

[119] Ibid., para.2.22.

[120] Ibid., para.2.23.

However, by the time the Report was submitted, the Policy Advisory Committee no longer regarded living on the earnings of a prostitute as a case of exploitation that justified intervention[121] . Similarly, the majority of the CLRC were satisfied that their suggestion would cover most cases[122] . Had this recommendation been accepted, prostitutes may have been given a fairer chance to lead family life, while a morally led provision would have been repealed.

The CLRC's proposals

The CLRC proposed a set of new provisions, replacing s. 30 and 31. to be applied regardless of gender of perpetrator or prostitute[123] . Various propositions were made:

1. Exercising control or direction over a prostitute or organising prostitution.[124]

The suggested offence would be along the lines of s.31 and would apply to clubs, escort agencies, saunas and massage parlours. Two members of the CLRC considered this wide scope unnecessary[125], presumably because discreet prostitution did not cause much nuisance. The proposed maximum penalty was 5 years imprisonment[126] , which was criticised as not serious enough by those, including Matthews, who regarded offences involving exploitation and coercion as most serious, comparable to rape[127] . In the Report, the maximum was raised to 7 years, akin to s.30, for organised prostitution, and 3 years for controlling a single prostitute[128] .

The final recommendation, however, separated it into two distinct offences: organising prostitution for gain (controlling the activities of several prostitutes)[129] and controlling or directing a prostitute for gain (concerning the ponce)[130] , although the two could overlap. Different grounds justified the offences: the wish to penalise those who made a business out of prostitution against the need to protect the individual prostitute[131] .

The prostitute's vulnerability, her relative isolation and status as an outcast, which all mean that she would not be willing to bring charges against the accused or to testify, this central problem,

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[121] CLRC 1985 Report, op.cit. para.2.27.
[122] Ibid.para.2.28.
[123] CLRC 1982 Working Paper, op.cit.para.2.6.
[124] Ibid.para. 2.7-2.8.
[125] Ibid.para. 2.9.
[126]Ibid.para 2.23.
[127] Matthews,R. (1986), at p.208.
[128] CLRC 1985 Report, para.2.30.
[129] Ibid. para.2.11
[130] Ibid.para. 2.12.
[131] Ibid. para.2.15.

attributed by Matthews to the current legislation, would still be relevant even if the changes were executed[132]. Matthews compared the situation of the prostitute to that of the battered wife, in the similar reluctance to testify and the probable use of irrelevant personality judgements by the police, that would lead to dropped prosecutions. This comparison will be further developed when discussing marital rape, emphasising the link between social perceptions and legal consequences. One observation is that while some consideration has been taken of women who suffered domestic violence, and legal means have been gradually introduced to facilitate their safety, providing the right conditions for prostitutes who may wish to extricate themselves was not mentioned by this Committee, nor by its predecessors.

2. Advertising services of a prostitute.

The issue of advertising has been important to this discussion as it treads on the border between public and private. While it is reasonable to expect a like treatment whether the publisher's fee comes from prostitutes or from customers, unlike the courts' interpretation of s.30[133] , it is still questionsnable whether advertising prostitution should form a separate offence. The issue would have become crucial had the CLRC's recommendation to repeal s.30 been adopted, as convictions of publishers for living on earnings of prostitutes would have had to change. Furthermore, advertising by the prostitute herself was not covered by the current law, and few Committee members and commentators felt that it should have been[134] .

The legal attitude is capable of either facilitating a relatively discreet trade, preserving some of the prostitutes' dignity, or sending prostitutes to the streets. Some members of the CLRC and of the Policy Advisory Committee considered that discreet advertising should be permitted, as it may reduce street soliciting without stimulating demand[135] . This view merely reflected a reality of unprosecuted advertisers.

Other members held that it should be an offence for a person to publish and advertise for the services of a prostitute, since advertising facilitated organised prostitution and stimulated demand[136] . They also claimed that "discreet" was an uncertain and subjective basis for a law, and would probably cause offence anyway. However, no consideration was given to how it should be defined. Furthermore, "obscene" and elements of other offences may be similarly criticised, and have nevertheless featured in recent legislation. Ambiguity should certainly be

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[132] Matthews,R. (1986), p.207.

[133] In *Ansell* [1975]Q.B.215, 223 it was held that when payment came from the men, "its receipt must be so closely connected with the exercise by the defendant of direction, influence or control over the movement of prostitutes that it could clearly and fairly be said to be the earnings of prostitution."

[134] CLRC 1985 Report, para 2.21. This suggestion was rejected in para.2.22.

[135] CLRC 1982 Working Paper, para. 2.10

[136] Ibid. para. 2.11.

avoided, but on balance between a degree of unclarity against creating a dead letter, as advertising was already common and generally ignored, there is little doubt that the law should be realistic, attempting to control within reasonable bounds.

The Policy Advisory Committee's recommendation, to leave advertising to the general law of obscene publications and indecent displays, was supported by certain commentators but not the majority of the CLRC[137] . This rejection exemplifies the issue of keeping arguably superfluous provisions, that could be covered just as well by existing legislation, sometimes without involving the criminal law[138] . The motives have probably been the same as regarding the reluctance to unify offences, the social condemnation of the allegedly offensive act. Thus, although the current level of discreet advertising was pronounced "tolerable", and no changes were proposed, it was nevertheless hinted that the proposed offence of assisting to meet a prostitute may accommodate convictions[139] .

Awareness that prostitution itself should not be made illegal, not least because that would drive the trade back to the streets, was the professed key to the recommendations. Advertising undoubtedly constitutes the almost only opportunity for prostitutes to meet clients when the law makes it quite impossible to use any vaguely-public place. A certain tolerance could have created a more human environment for the prostitute, as would decriminalisation of simple poncing.

Paradoxically, the CLRC's fear that the repeal of s.30 would increase advertising to an intolerable level, proved right a decade later even though the section had not been repealed. Advertising has grown both in volume and in its explicity, at least as an inner cities problem, the existing law apparently failing. Thus, papers reported in October 1994 that huge amounts of prostitutes' cards were caught in an operation conducted by the Council of Westminster, but were replaced soon after. As some of this material is probably obscene, indecent, offensive or blatant[140] , and not much is done about it, the question of discreet advertisement seems to be of theoretical value only.

3. <u>Arranging or facilitating the making of a contract for prostitution (assisting for gain to meet a prostitute for the purpose of prostitution)</u>

As the CLRC recommended to draft a whole new body of offences, it inevitably involved a process of determining the borders of legal involvement. The majority of the Committee, holding that facilitating prostitution should always be discouraged[141], regarded criminal law

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[137] CLRC 1985 Report, para.2.21

[138] See following discussion regarding control of massage parlours and saunas.

[139] CLRC 1985 Report, para 2.22.

[140] The last two adjectives are used by the Indecent Displays (Control) Act 1981.

[141] CLRC 1982 Working Paper, para. 2.14.

application justifiable even in border-line cases, including a hotel porter tipped to connect a customer with a prostitute, short of suppliers of goods. Such cases would not have been triable under s.30, and criticism may be targeted at the intervention with tolerable and discreet prostitution. The initial approach had to be modified following criticism, replacing the civil law term "a contract" with the more general "to meet a prostitute for the purpose of prostitution"[142] . While the clearest cases contemplated by the CLRC were that of the pimp or the escort agency, the final version was still wide enough to put at risk a large range of providers of services, including, it was admitted, advertisers of prostitutes' services[143] , as 'gain' would have become the main element. The Committee's own hesitation in formulating a definite provision attests to the difficulty but also to the urge to criminalise.

The suggested maximum penalty had been a severe 2 years imprisonment[144], reduced in the Report to 6 months[145] . However, it still indicated the seriousness with which this conduct has been regarded, particularly considering that this provision would probably be most often used. Denial of freedom for any period of time is harsh, and the symbolic meaning of imprisonment has been discussed before.

Brothels and Premises Used for Habitual Prostitution

The CLRC reviewed the existing law concerning brothels and premises used for habitual prostitution[146] and recommended replacing it with three specific offences of managing, letting or permitting the use of premises for the purpose of prostitution[147] .

The very notion of "a brothel" was deemed unsuitable since so many different establishments might qualify. Thus, the common law concept which included premises habitually used for non-commercial sex would no longer apply. The extent of criminal liability of those engaged in the operation of massage parlours, or escort agencies, for example, cases that were brought to court frequently, presented a problem, involving the offences of living on the earnings of a prostitute and keeping a brothel[148] , but with no satisfactory outlined limits. A rearrangment of the law was needed.

The limits of intervention would have been determined by the motive behind the legislation. As

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[142] CLRC 1985 Report, para 2.18.

[143] Ibid., para 2.22.

[144] CLRC 1982 Working Paper, para.2.23.

[145] CLRC 1985 Report, para 2.30.

[146] Mainly the provisions of s.33 to 36 of the SOA 1956.

[147] CLRC 1982 Working Paper, para. 2.39, CLRC 1985 Report, para. 3.13.

[148] Petty, R.N. (1982). Petty called the law in this context "scrappy and irrational" as a result of the duality of the public's mind.

some of those new establishments were probably rather discreet, nuisance could hardly justify legislation, especially since, as Leng and Sanders advised, it has been unusual to justify a serious offence by reference to nuisance.[149] Exploitation, however, could justify radical measures. Opinion, though, have varied. While in some European countries commercialisation has been regarded with indifference, and , as seen, several critics promoted legalisation, an adverse view advocated tightening the laws, in an attempt to minimise economic exploitation. just as criminalising the ponce was needed in order to limit personal exploitation. A prominent supporter of this view, Matthews, has urged a general shift of emphasis from the visible and public to the less conspicuous but more fundamental exploitation, hence demanding a more restrictive legislation regarding pimping, procuration and brothel keeping[150] .

Matthews' basic argument, that the commercialisation of prostitution leads to and reinforces the notion that women are primarily sexual objects, thus causing even further dependency and degradation, seems convincing, against those who argued that legalisation would prohibit the incidence of sexual crimes, although the feminist dilemma whether prostitution should be regarded as sexual slavery or women's emancipation will be referred to later. Matthews' argument contradicted the Committee's observation that the main objection to legalisation was a moral one[151]. His view, which could have been substantiated by research, would have given legislation a sounder basis than the assessment that public opinion would not have tolerated centres of prostitution.[152].

The CLRC found little support for radical suggestions, whether aimed at relaxing the laws or tightening them. The proposal to legalise brothels was consequently rejected, following a certainty of nuisance and offence to the neighbours, and, more fundamentally, a fear that legalising would increase demand and recruitment of women[153]. Although the Wolfenden Committee had used these arguments, it seems that support had anyway been lesser then[154] . The suggestion to leave the brothels issue to be prosecuted under living on the earnings of a prostitute or controlling a prostitute was similarly dismissed.

Opposing proposals to criminalise prostitutes who worked in brothels[155] or customers who frequented

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[149] Leng and Sanders (1983) , p.647.

[150] Matthews,R. (1986) , at p.209.

[151] CLRC 1982 Working Paper, para. 1.11.

[152] Ibid. para.1.22.

[153] Ibid. para. 2.30.

[154] The Wolfenden Report, para.293

[155] e.g. Petty, R.N. , (1982). Petty, a solicitor, supported a policy of prosecuting prostitutes, as an essential element in the functioning of a forbidden institute, even via the controversial offence of conspiracy to corrupt public morals, by a transition from using the offence regarding public affairs (advertisements) to the private.

them[156] were also rejected, as, presumably, such convictions would not decrease the number of establishments.[157]

While this conservative, cowardly attitude ostensibly coincided with former committees, the CLRC nevertheless showed a greater degree of social awareness in one attempt to relax the rigid laws. It was quite radically proposed that the offences would not apply regarding premises used for prostitution by not more than two prostitutes having their home there[158] . The considerations were the security and quality of life of the individual prostitute. Another ground, for those who did not rate the benefit of the prostitute highly, was the chance of reducing street prostitution.

Commentators were equally divided on this issue. The opposition maintained that more prostitutes would work (legally) in their homes, which may affect children badly. Further considerations were the possibility of exploitation and the temptation of free accommodation for the young and vulnerable. However, even if one regarded exploitation as the greatest evil and opposed legalisation fiercely, a minimum degree of cohabitation could still be considered necessary, allowing the prostitute some protection and autonomy[159] . Obviously, critics who supported legalisation, such as Leng and Sanders, held that prostitutes should be able to work together without a manager, without arbitrarily limiting their number to two.[160]

In the Report, following criticism, a recommendation to this effect was not made[161] . This retreat may indicate that the social awareness facade was not as genuine as could be supposed. The isolation of the prostitute following the current law, the probability that she would consequently have to look for protection of a ponce, an undesired result in itself, were not deemed important enough.

An example for a possible alternative to the use of criminal law was given in the CLRC's recommendation to control massage parlours and saunas, a growing concern in the 80's, through the introduction of licensing schemes that would include conditions regarding sexual services and would allow inspections[162] . While the scope of this suggestion was very limited, Leng and Sanders' applied the same principle in proposing to control the activity of premises generally, similar to control of premises that provide services late at night and thus cause

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[156] It seems that Petty (Ibid), probably representing a wider public, considered the embarrassment to the caught customer suficient, although why he should not be regarded as an essential part was not made at all clear.

[157] CLRC 1982 Working Paper, para. 2.36.CLRC 1985 Report, para. 3.12.

[158] CLRC 1982 Working Paper, para. 2.33.

[159] Matthews,R. (1986) , at p.209.

[160] Leng and Sanders (1983) , at p.648.

[161] CLRC 1985 Report, para 3.4.

[162] CLRC 1982 Working Paper, para. 2.38.

nuisance, a proposal that had been made in the past.[163] Such control, however, would allegedly be similar to legalisation, therefore undesirable. The use of criminal law only when necessary was not, apparently, a priority.

The Committee's recommended scheme of offences included three new offences that would not use the term "brothel" but "premises used for the purpose of prostitution" and thus all the precedents that had interpreted the term "brothel" widely would cease to be relevant.
Furthermore, brothels should be taken out of the common law as much as possible[164] .
The maximum suggested penalty was two years' imprisonment, for the "worst cases"[165], modified to 6 months' imprisonment ,or a high fine, in the Report[166] . Another common law offence, keeping a disorderly house, was considered mainly regarding premises where services of sado-masochistic nature were offered. Although the paternalistic argument was rejected as a justification for intervention, the Committee nevertheless recommended a specific offence, relying on the alleged nuisance[167] .

Procuration

The Committee recommended that the various procuration offences be kept in a similar form, with minor revision.

Should procuration continue to be an offence regarding adult women? What should the age limit be? Should procuration of males remain an offence when there was no question of prostitution, and where the two persons committing the homosexual act were not themselves guilty of any criminal offence? All these controversies raise questions of paternalism and victimless crimes, or the intervention of criminal law with private morality.

Both regarding procuration of adult females and procuration of males, the Committee recommended retaining the present scheme of offences[168] . Discussion about procuration of females was brief, accepting that "the law should not encourage the recruitment of women into prostitution"[169] . Why it should, however, so vehemently and actively discourage it was not explained, obviously taken as self-evident. The only modification was the recommendation to reduce to 18 the age limit regarding procuration of a girl under the age of 21[170] , concurring with

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[163] Leng and Sanders (1983) , at p.647.
[164] CLRC 1982 Working Paper, para. 2.40.
[165] Ibid., para. 2.40.
[166] CLRC 1985 Report, para. 3.17.
[167] Ibid. 3.9.
[168] Ibid., para 4.4, para. 4.14.
[169] CLRC 1982 Working Paper, para.5.7.
[170] SOA 1956, s.23.

the age of majority.[171] However, even this slight change was irrelevant since it necessitated an initial amendment to the definition of "minor" in the 1949 UN Convention for the Suppression of the White Slave Traffic[172] . The Committee itself mentioned procuration as an example for an offence that necessitated making of moral judgments[173], reasoning that the law should intervene when public opinion insisted that it should, to minimise any mischief[174] . This attitude has been accepted by the courts, who, in one example, defined the offence as "sickening", imposing severest sentences[175] .

Recommending the retention of the law pertaining to homosexuals was a more controversial move. In both cases, the acts themselves, whether prostitution or homosexual acts in private, have not been offences. Yet it seems that while prostitution had retained a strong public disapproval, homosexuality in private was losing its stigma. Ever since its legalisation, equalling it with prostitution by such an offence was increasingly regarded as injustice. The Committee was inclined towards a retention of the offence, on the ground that the (justified) thinking behind the 1967 Act had been that participation of a third person raised different issues, that justified interference with the freedom of consenting adults, and that procuring for the purpose of prostitution would be difficult to distinguish (and presumably to prove)[176] . The criminalisation of procuring to an act that was not an offence was justified in the Report by comparing it to other similar, far less controversial offences, such as controlling a prostitute[177] . Few opposing comments were mentioned, among them the Criminal Bar Association claim that it was contrary to general principles of responsibility in the criminal law.[178]

Another recommendation, to apply the offence to women procuring homosexual acts, followed from the professed aim to create, as far as possible, a gender-neutral law. A desirable measure, putting the genders on par, has thus been applied to a highly questionable offence.

Summary of the Committee's Attitude to Allied Offences and Alternatives

The renewed interest in less visible offences, the shift from the public to the private sphere, was not a coincidence. By comparison, as seen, the 70's Committee did not suggest any changes to the 1959 Act. Matthews, who analysed the law regarding prostitution as an economic tool, influencing the relation between the female labour market and the marriage market, argued that

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[171] CLRC 1985 Report, para 4.5.

[172] 98 UNTS 101.

[173] CLRC 1982 Working Paper, para.1.10.

[174] Ibid.

[175] See "Three women jailed for forcing runaways into prostitution", *The Guardian*, 27Nov.1993.

[176] CLRC 1982 Working Paper, para.5.13.

[177] CLRC 1985 Report, para 4.14.

[178] Ibid., para 4.12.

the different political and moral climate in the 80's, gradually undermined the 'liberalism' associated with Wolfenden. Contributing factors have been observed here: the resurgence of the women's movement, the organising of prostitutes, changing gender roles and economic positions, political conservatism. The political significance of crimes, new to the 1970's, has gained more weight.

The CLRC itself, when defining its approach, showed a lesser commitment to the Wolfenden philosophy and declared the "necessity of making moral judgements"[179] . The 1984 Report did not mention this philosophy among the considerations determining the desirable law[180] , and in the 1985 Report, some members suggested that, while the Wolfenden philosophy was still relevant to street offences, a shift in the public opinion away from it justified the moral guidance of the law even between consenting adults[181] . As analysis of the previous legal situation showed that moral judgements had been made, ignoring Wolfenden's philosophy, this saying may have just expressed the actuality. However, it may more accurately be interpreted as reflecting the political shift to the right, in its more overt and systematic criminalisation of the private. This stance is confirmed by Newburn's observation regarding the Williams Report, that "the Thatcherite 80's were a period of increasing hostility to any views approaching the philosophy of the Wolfenden Committee"[182] . Further support is provided by the comparisons to the 1970's ignored recommendations, made when the political climate had been different, which had been, on the whole, far more extreme, or, one may argue, braver.

The major conceptual change of this era seems to have been the emphasis of the social environment, over individualism. The social awareness of the CLRC and the influence of theories that may have justified restrictive law on grounds other than purely moral ones have therefore become relevant.

Different recommendations seem to have exemplified applications of different principles. At the cost of losing theoretical uniformity for compromises[183], attention was apparently focused on practicality and enforceability, expressed in the professed willingness to consider proposals designed to limit the ambit of the criminal law, provided "this could be achieved without causing unacceptable consequences"[184] , following this potentially radical statement by an embrace of policy resembling the law as it had been ever since the Wolfenden Report, and even before that, namely, to discourage prostitution and to control exploiters[185] . Much of it may be explained by

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[179] CLRC 1982, para.1.9-1,10.

[180] CLRC 1984, para. 9-10

[181] CLRC 1985 Report, para 1.6.

[182] Newburn, T. (1992) at p.183.

[183] as admitted in CLRC 1985 Report, para 1.6.

[184] Ibid.

[185] CLRC 1982 Working Paper, para. 1.14.

the Committee's social awareness, greater than that of its predecessors. The sources of information used were correctly diverse, including, for the first time, evidence from prostitutes, although it was criticised for not commissioning any empirical research.[186]

Stemming from this awareness, the major difference between this Committee and previous ones was the alleged emphasis on the human nature of the prostitute, perhaps partially a result of continuous pressure put by "politicised"[187] organisations of prostitutes (such as PROS)[188], social workers and others. One example was the interest in the prostitute's difficulties in finding an accommodation[189] . Furthermore, it led to recommendations aimed at relaxing the law to allow the prostitute to lead normal life, as far as the Committee saw right, such as by (the rejected) recommendation to allow her to share a flat with another prostitute and the suggested narrowing (even if very limited) of s.30 of the SOA 1956.

Expressing social awareness and committing to a social theory are, however, two distinct things, and the latter has definitely not been done. The CLRC only agreed that rigid adherence to either principle would be unrealistic and impractical.

A wave of literature has dealt with this material. Many of the mentioned evaluations of the Wolfenden philosophy and the law, were written in the late 70's- early 80's, whether under feminist, neo-conservative or radical[190] theoretical frameworks. Extremist theories reintroduced the issues as part of their analysis of the establishment. The three factors mentioned by Bottoms concerning the emergence of left-realism in the late 80's, namely, the growth of crime, the problems of the urban priority areas and modern interest groups[191] , had already been discernible.

The Committee was aware of feminist groups that criticised prostitution, along with the social tolerance. Edwards, who regarded the prostitute as a victim of organised crime, largely controlled by males[192] , may be seen as a representative of this attitude, to a certain extent. If the prostitute were a victim, the law could not be regarded as dealing with victimless crimes, and liberal attitudes of non- intervention simply would not apply.

The borders between the theories were sometimes blurred. Thus, for example, Hall's stand was evaluated by Newburn as a political-economic outlook, but its striking resemblance to feminist

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[186] Leng,R. & Sanders,A. [1983] , at p.644.

[187] Edwards, S. (1983a), at p.40.

[188] CLRC 1982 Working Paper, para. 1.21.

[189] Ibid. , para. 2.39.

[190] e.g. Hall, S. (1980) op.cit.Wilson,J.Q., (1985) .

[191] Bottoms,A.E. (1987), at p.250.

[192] Edwards, S. (1985b).

writings, in recognising the legislative emphasis on traditional women's roles, was overlooked. The relationship between competing theories, primarily the economic analysis of crime and feminism, will be reviewed later.

Matthews presented a similar, if more elaborate, argument, perceiving even consensual relations of the prostitute in the wider picture of a society where non-equals entered into relationships. The alleged free will at the basis of those agreements was consequently worthless[193]. This emphasised autonomy will become even more crucial in the context of marital rape, where the situations of the prostitute and the abused wife will be compared. Matthews therefore claimed that prostitution may and should be eliminated by widening the scope of criminal liability , eventually securing a greater freedom and human conditions for women[194] . Coming from a new-left approach, he advocated focusing on the law as a protective instrument of social defense[195] . Concentrating on society and not on the individual, he reached a similar conclusion to Lord Devlin's, a view that had not been heard often since the 50's. Vulnerability justified intervention. His argument was economic, as criminalisation reduced potential profit and thus the overall rate of exploitation.

This was an innovative approach since, as seen so far, the prostitute's welfare had usually been connected to state control by legalisation of brothels, or to decriminalisation which would supposedly turn it into yet another profession, and even contribute to women's liberation, maintaining their independence. Matthews, however, analysed decriminalisation as not that radical, since it essentially was an expenditure saving policy of non-intervention, not a critical alternative. However, Matthews' view matched a feminist claim that prostitution contributed to objectifying women and thus to the prevailing male ideology that should be transcended.

The CLRC could have relied on such theories, rather than on moral views, for support for much of its recommendations, including wide criminalisation of solicitation, advertising, procuration and rejection of decriminalisation. It should be remembered, however, that the CLRC's final recommendation regarding criminalisation of male solicitation had been wider than the 1985 Act's formulation but still allocated the customer a preffered status. Such adherence, beyond its political meaning, would have had further implications, including a possible support for unification of offences and abolition of safeguards. Although the end results may have been rather similar, the Committee's recommendations' acceptance in legislation and enforcement was bound to be deficient, as the theoretical foundation was lacking.

The new right seems to have reached the same conclusions as the new-left (or left

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[193] Matthews, R. (1986) ,at p.201.

[194] Ibid.

[195] Matthews,R. (1986) , at p.199.

regulationism, Matthews' suggestion), that legislation, even with its serious limitations, still managed to provide defensive and protective elements, and to deter. Therefore, it should be changed only to facilitate further protection. The basis for the conclusions may have been entirely different, as Matthews did not intend to enforce traditional morality, yet just as he would have gone further to ensure deterrence, protection from exploitation, reduction of annoyance and of commercialisation, so would many of the commentators, committees' members and MPs. Criminalising the customer was a step in this direction, although mitigated by the inclusion of safeguards.

The conclusion ostensibly reached by all the sides of the argument, supporters of legalisation and of restrictions alike, was that the law could not be neutral. Each party used it to justify its way. Thus, Leng and Sanders argued, from a utilitarian point of view, that as that which was not prohibited was permitted, licensing was just a question of formality under the current circumstances, even if it would be against public belief[196] . As seen, Matthews used the same argument to justify legal intervention (as a positive social tool) by broadening the base of illegality. The other implied common thing is, then, the view that the law should lead the way, a possibility that has been discussed before and which obviously was not shared by the Committee, who often referred to public opinion. The gap between the official view, at least as represented by the Committee, and the commentators', seems to have been wider than ever, and so was the gap between commentators, from suggestions to radically relax the laws, such as Russell and Owen's, supported by Gallup surveys which found a tolerant public[197], to Matthews' radical regulationist alternative.

Since none of the recommendations regarding allied offences have been adopted, assessment of their chances of practical success is impossible. Had the law been amended, it is possible that the balance between control of the exploiters and what Edwards called "the obsessional control of the street walker"[198] would have been fairer. Leng and Sanders, writing after the publication of the Working Paper, argued that such a change would express disgust but would not deal effectively with the problems[199], as it would leave most prostitutes outside the law and the police would have to confront unenforceable laws. This view may provide another explanation to the failure to enforce the kerb-crawling provision.

The Parliamentary silence itself, following the onerous task , the comprehensive review executed by the Committee, needs explaining. The fact that only kerb-crawling gained Parliamentary notice, besides indicating the shift to the right, is another example of the dubious

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[196] Leng,R. & Sanders,A. [1983] , at p.655.

[197] e.g. Russell,K.V. & Owen,C.(1984),p.95. Leng,R. & Sanders,A. [1983].

[198] Edwards, S. (1985b) , at p.930.

[199] Leng,R. & Sanders,A. [1983] , at p.654,655.

connections between legislation and legal thinking, as it seems that too often only pressing public opinion has led to activity, invariably hasty, led by heated arguments. This problem is magnified if theories such as Matthews' are embraced, demanding a broad solution, based not only on legislation but on fundamental social changes, that can not be possibly achieved by a patchy ad-hoc legislation. Such theories, however, seem to necessitate an understanding of the law as guiding public opinion, a political risk that is not likely to be taken often.

THE 90's

In many ways, the 1990's have been, so far, very much a continuation of the 80's situation. The conservative government, crime remaining a central political issue, the economic situation (which is often blamed, as seen, for street and other crimes).

The problems of nuisance by kerb-crawlers and street prostitution has apparently become graver and so has public pressure to solve it. Therefore street crime has stayed on the agenda while allied offences took a secondary place. As reviewed, the 1985 Act has not been used much, and following this inadequacy, the issue seems never to have left the headlines for long.

In Parliament, the decade started with a Sexual Offences Bill, presented to the House of Commons in mid-1990[1] , proposing to abolish the requirements of "persistence" and "annoyance" in the 1985 Act[2] . This would have created a considerable discrepancy between soliciting from a car and soliciting on foot, explained by the Minister of State as emanating from the much broader scope of the kerb-crawling problem[3] .

The Bill did not pass into law, but a few points are worth considering, particularly as the frequently discussed elements of 'persistence' and 'nuisance' have been debated ever since the 1950's. The balance which had been very much in favour of the "perfectly respectable men" in danger of false accusations, seems to have somewhat shifted, as a result of the practical failure, if not a profound ideological change. Had the Bill been adopted, the offences could have been asymmetric, as the alleged safeguard that existed for soliciting by women, the burden upon the prosecution to prove that the defendant was a prostitute (although its practical value, as argued, has been doubtful) did not exist regarding kerb-crawlers. Mr Mellor, answering criticism of this ostensible disadvantage, declared that the separation of the prosecution service from the investigating body provided the required check and balance.[4] While this may be convincing, his further remark, that careful prosecuting would be achieved through guidelines issued by the Attorney-General and by police, presented a problematic concept, hovering dangerously on the brink of the unconstitutional, a danger of which Mellor himself was aware. A law whose application had to be modified before it was even enacted could hardly be a good law.

The police argued that the legislation failed because of the weighty onus of proof.[5] Even facing this official admission of failure, most MPs still emphasised the fear of indicting an innocent

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[1] Sexual Offences Bill, Parl.Deb., Comm. ,11.5.1990,col.509.

[2] SOA 1985, s.1.

[3] Parl.Deb.,Comm. ,11.5.1990, col.544. per The Minister of State, Home Office (Mr David Mellor).

[4] Ibid. col.546.

[5] Ibid.

man as the prominent legislative consideration, however grave the nuisance.[6] Others feared that the repressive Bill would lead to erosion of individual rights, especially as the judicial authority, magistrates court, allegedly gave police the benefit of doubt where conflicting evidence existed, even without this further proposed strengthening of police powers.[7] Evidently, such concerns have not been expressed regarding prostitutes. However, Mr Bennett presented the essential question, whether the police had tried at all to use the law and failed, or was there an "overwhelming unwillingness" on their part to enforce the law[8], which would have made a farce of any amendment. Consequently, the situation was surprisingly similar to that preceding the 1985 Act. As before, the problem would not have necessarily benefitted from any legislative change, as it could just be another patch on a dysfunctional body of legislation, destined to fail.

Trends and directions

Feminism in the 90's

The Bill was presented as a further step in a growing Parliamentary awareness of women's issues, designed to protect harassed women on the streets.[9] Similarly, Tom Cox MP, who supported the Bill, regarded it as a matter of preferring the rights of women who suffer harassment and abuse to other people's rights.[10]

These claims seemed superficial to Ken Livingston MP, who argued that the climate had to be changed, through profound reforms of the pornography industry and the general use of female bodies to purposes such as advertising.[11] According to Livingston, focus should be on prevention, on examining and tackling the social causes of prostitution.[12] A similar view of the issue was offered by prostitutes' organisations, who saw a broader necessary change, beyond their required abolition of prostitution laws, that would give women economic power to refuse prostitution.[13]

Although the MPs were possibly simply paying lip service to a fashionable cause, and a broader change has undoubtfully been essential according to a comprehensive conceptual framework, the fact that women's rights were ostensibly deemed weighty in the balance between competing interests, could nevertheless indicate a change. In previous debates, the interest of the innocent

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[6] Ibid. col.544.per Mr A.F.Bennett.

[7] e.g. Ibid. col.556. per Mr Livingston.col. 563.

[8] Ibid.col.511.

[9] Ibid. col.514. per Mr Mellor.

[10] Ibid. col.534.

[11] Sexual Offences Bill, Parl.Deb.,Comm. ,11.5.1990. col.531, 555.

[12] Ibid. col.554.

[13] e.g. Lopez-Jones,N.(1992),at p.595.

male had been the promoted and preferred one. Eventually, howerver, it won here too.

A view such as Livingston's, expressed in Parliament, would have been inconcievable without the influence of the women's movement in the last 30 years. However, the feminist agenda (or post-feminist) in the 90's has seemingly taken a different direction, which may explain the quiet following the spate of reactions to the issue during the 1970's and 1980's. American feminists' influence has apparently been strong, with its focus on topics such as date rape, another rendition of the border between sex and crime, and, as will be seen, domestic violence. The women's movement was accused of becoming arid, abandoning goals.[14] Persisting problems, including the predicted crisis in prisons following the sharp increase in imprisoning fine defaulters[15], have received little recent notice.

This relative silence may emanate from a contemporary feminists' view that the formal law should be "decentred", as suggested by Carol Smart[16] , challenging the very appropriateness of the legal system as a site for a change of women's conditions. Since it started appearing in feminist writings towards the end of the 80's, discussions have shifted from alternatives to existing legislation, aimed at improving women's situation, from within the system (many concerning prostitution laws, as seen) to more fundamental arguments that could have meant, ultimately, an abandonment of legal analysis. This new route, undoubtedly radical, may be interpreted as hinting at escapism or even defeatism, rooted in an assumed failure of feminists to influence legislation substantially. However, those supporting it did not see it as a failure, since they based the argument on the presumption that the legal method had been impervious to feminist critique and therefore all attempts were bound to be futile anyway.[17] Not only that, but stressing the powerlessness of feminism would only reinforce the power of law and legal method, according to Smart, the concept of "power" being a central point of reference[18] .

While the feminist movement has obviously had to act in order to retain its power, which could be seen as diminishing as a result of the seemingly stable law, it appears that Smart's very argument could be used to illuminate the impracticability of the approach. If the law is indeed as powerful and invasive, decentring it may be a noble theoretical strategy, but hardly a practical option for women who have been confronted by it. This very account, for example, could arguably serve the current system in its analysis of it. Yet by stressing the changes achieved throughout the studied period, even if minute, it may present a better incentive for pursuing

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[14] e.g.Gill, A.A. , reporting on "Sex, fear and feminism: The Sunday Times Forum", *The Sunday Times*, 23 January 1994.

[15] Cohen,N. , *Independent On Sunday*, 26 February 1995.

[16] Smart,C. (1989).

[17] Ibid., see p.21,25, after M.J. Mossman.

[18] In this regard, her theory is reminiscent of conflict theories, specially Marxist criminology. See: Vold,G.B. & Bernard,T.J., (3rd ed., 1986), from p.269. Comparison of these attitudes will be made.

further possibilities than would have been achieved through ignoring the law. In this context, the political side of feminism should not be forgotten. As any other political movement, the women's movement has been interested in gaining power and not losing it, but it has had to offer reasonably practical solutions, not just theoretical arguments.

Although Smart's approach has not been generally adopted[19] , especially as a clear alternative policy was not suggested, the "gender neutrality" strategy of the 1970s and 1980s, which led, among other things, to demands not to exclude the client or the male prostitute, has been largely abandoned. It may be argued that earlier feminism questioned what type of conduct should or should not be within the scope of the criminal law, presenting an alternative formulation, and even morality, to determine the answers. Those questions were legitimate within the traditional legal system, as repeatedly illustrated. The recent theoretical discussion undoubtedly raised awareness to fundamental questions of legal intervention, and contributed to a more complex analysis, not the simplistic view of the law as a male conspiracy, a view whose traces had sometimes been evident in feminists' reaction to prostitution laws, especially Edwards'. Smart and her supporters attempted to shift the emphasis, to question the justification of the legal system's power, a theoretical route which would not allow for questioning the contents of the rules. The far reaching implications of this stance will be further evaluated when feminist reactions to marital rape are compared to those regarding prostitution.

Local control

In recent years a significant shift has been detected, from concentrating on general control, possibly one of the achievements of legislation following the Wolfenden Report, to a local one. This decentralisation has taken a few forms.

A private amendment, moved by Bennett MP, suggested that the application of the revised provision (had the Bill been passed) be limited to "designated local authorities". The designation would require complaints from the public, and police's satisfaction that there was a problem and that all other reasonable steps had been taken. This amendment was rejected by the majority of the few MPs who participated in the discussion. The amendment would have re-defined the relations among citizens, police and local authorities. Although Mr Bennett argued for the "democratic debate about policing in a particular area"[20], the practical and theoretical desirability of this civilian involvement in criminal law enforcement is questionable, as is the role of police in determining whether a certain law should apply to an area. Whereas so far public involvement has been limited to public pressure, action groups and willingness to complain and, if needed, testify, this provision would have set a far more active and invasive

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[19] for reference to supporters see: Grageor,R. & Morgan,J.(1990), p.30.

[20] Parl.Deb.,Comm. ,11.5.1990. col.511.

role for the public, enabling abuse and misuse of it. Moreover, it leads to the general debate concerning victims' appropriate roles, discussed later.

Allegations about the arbitrary and biased enforcement of prostitution laws[21] strengthen the doubts about the desirability of greater police powers in local control. The suggestion may be plausibly viewed as a regression to the pre-Wolfenden days, as the situation would necessarily vary locally. This predicament had been rejected by the Wolfenden Committee as unsatisfactory, and some considerations still apply. The local authorities will have to have some control over policing. Local considerations may be harmful to the broad picture. It is hard to imagine that such a provision be proposed regarding drug dealing, for example. As Mr Livingston commented, facing a problem, the local authorities would come back to Parliament[22] , in what could easily turn into a vicious circle of shifted responsibilities.

Livingston strongly supported local initiatives such as introduction of traffic control schemes and local police surveillance.[23] However, such an attempt, in the early 80's, that was claimed by Matthews to have been successful, came under attack. As with Bennett's proposal and Livingston's schemes, locally focused initiatives may affect other areas badly. Lowman, relying on Canadian experience, argued that Matthews' assertion concerning the opportunistic nature of prostitution was wrong, disproving the optimistic theory that local changes would lead prostitutes to quit practising[24] .

Replying, Matthews attributed the success of the attempt to the "multi-agency approach", which
--as not to be confused with 'community policing', insisting that resulting displacement of
ostitutes had been insignificant.[25] Furthermore, Matthews claimed that displacement was not
cessarily a failure, as the trade would have had less negative effects in different areas. Thus,
promoted "negative zoning" as a desired policy of confronting the problem, removing the
isance away from the worst affected areas. His approach raises previously discussed
servations, as it requires high levels of organisation and commitment of the residents. It will
interesting to see whether Matthews has persuaded the current Parliamentary group's
embers to support his view, and whether this experience could succeed on a much larger
ale. However, for the purposes of this account, it is the debatable theoretical foundation of the
hemes that is of interest, particularly when the application of the criminal law is involved, not
t implementation of traffic regulations.

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[21] "Policing of Prostitutes 'poor and corrupt'" (1994), based on a book by a chief constable of uth Yorkshire.

[22] Sexual Offences Bill, Parl.Deb.,Comm. ,11.5.1990. col.531.

[23] Ibid. col.533.

[24] Lowman,J. ", (1992).

[25] Matthews,T., (1992).

A point worth considering is that separation and allocation of authorities' powers emanate from both Mr Bennett's proposal and Matthews'. Has the helplessness of Parliamentary measures in reducing the nuisance led to the desire to transfer the problem to the local authorities, shifting responsibility and, presumably, blame? Or was it the will of the unsatisfied and pragmatic local authorities themselves to undertake the challenge, hoping to present alternative solutions?

In the mid-90's both assumptions look reasonable, considering local developments in certain parts of the UK. For the first time, the clash between those supporting legalisation and those opposing it led to direct results when local authorities in Edinburgh decided to grant entertainment licenses to saunas, aware of the ongoing prostitution. However limited this development has been, it is still significant in pulling prostitutes off the streets. (The situation is expected to be examined in court, following a challenge of angry neighbours.) In Birmingham, adversely, residents decided to maintain strategically located pickets in order to drive kerb-crawlers and prostitutes off. This shows the re-emergence of an interest group, for whom the new Parliamentary initiative may have been intended.

Yet another Parliamentary All Party Group on Prostitution, this time of back-benchers, is set to deliver its recommendations at a later date, after years of deliberations and hearing evidence from experts (including R. Matthews) along with affected residents. (However, it must be said that the government seems to insist that existing legislation is quite adequate, and support to more radical ideas is still sparse.) By November 1996, no such report has been available yet.

The Israeli Law Regarding Prostitution

British legal influence - Introduction

Despite the prominent interest with recent developments, some historical background of Israel's legal history is nevertheless necessary. If a comparison is to be drawn between the present Israeli and English legal identities, the roots of the legal system must be acknowledged, particularly considering the extraordinary influence.

Under the mandate entrusted by the League of Nations in 1922, Great Britain undertook to place "the country under such political, administrative and economic conditions as would secure the establishment of the Jewish national home".[1]

Article 46 of the King's Order in Council determined the scope of using British law. The courts were to "exercise their jurisdiction in conformity with the substance of the common law and the doctrines of equity in force in England"[2] so far as statutes did "not extend or apply". Common law and equity were thus incorporated into the law of Palestine as supplementary sources.[3] Statute law was not to be applied.

Scope for local variations was provided in a proviso to Article 46, to the effect that the "said common law and doctrines of equity shall be in force so far as the circumstances of Palestine and its inhabitants...permit..."[4] , a doctrine that was similarly applied throughout the British empire. In other countries, however, English statutes were not excluded.[5]

Additionally to indirect reception, enactment of Ordinances and Rules based on English models replaced the Ottoman law. Relevant to this study is The Criminal Code Ordinance, No 74 of 1936[6] , that constituted a general penal code for Palestine. Although the exact sources of the different provisions of the CCO are unclear[7] , contemporary English laws will be compared where appropriate.

Singularly, administration of family law had been left in the hands of the religious authorities of

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[1] Palestine Order-in- Council of 1922, Article 2.

[2] Palestine Order-in -Council of 1922, Article 46.

[3] Ginossar,S.(1966), at 383.

[4] Ibid. note 2

[5] "The use of English law in this country" (1945), p.280

[6] Hereinafter referred to as 'CCO' .

[7] For a n account of the legislative process and some origins of the CCO, along with similarities to other Colonial criminal codes see: Abrams,N. (1972).

the various communities, ever since the Ottoman occupation. Under the British Mandate, according to art.51 of the Order in Council, while the term "matters of personal status" was defined differently, limiting the exclusivity of the religious courts, they nevertheless continued to operate concurrently[8] . Consequently, religious effect on the law has been continuous, especially through its adherence to traditional family values. This adherence is understood as officially endorsed, considering that the religious courts have constituted the judicial authority in family matters for decades, under three different regimes. This point will be expanded, as the following discussion will be concerned with the scope of religious influence.

Article 46 was retained in 1948, together with all the law which had been in force on the eve of the establishment of the state of Israel, (including the CCO), subject to certain modifications[9] , aiming to provide a temporary legal foundation, that would be abolished with the introduction of original legislation.[10] Hence, the English law continued to affect, and defining the exact scope of reception became crucial, especially given the natural tendency towards (legal) independence, and as the mere change of language, translating the same provisions from English to Hebrew, modified formulation and interpretation.

Amendments of the CCO 1936, some of which will be discussed, exemplified the partial adherence to the English route, despite the fact that the remaining parts of the amended statute stayed English in origin, language and interpretation.[11] The courts generally favoured this tendency by deciding, long before it was legislated, that English precedents' status would be reduced to that of a persuasive authority.[12] Furthermore, comparison of a new statute with a previous one of common-law provenance has been disqualified as an interpretative tool.[13]

Israeli law was free to draw from other sources, including American and Commonwealth precedents, and, interestingly for questions of morality and law, conceptions and rules of traditional Jewish law.[14]

Consequently, a review of the ever changing prostitution laws should start with the CCO 1936.

As the first specific statute concerning these offences was enacted in Israel as late as 1962, the CCO provisions formed the law for a long time. A unique situation emerges, in which legal

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[8] Ginossar,S. (1966) , at p.382.

[9] Law and Government Procedures Ordinance,1948, s.11.

[10] Maoz,A.(1973) .

[11] Yadin,U. (1962).

[12] e.g. CA 81-84/55, *Cochavi v. Becker*, 11 P.D. 225."P.D." stands for Piskei Din (Judgments of the Israeli Supreme Court).

[13] Yadin U. (1990) at p. 376.

[14] Yadin U.,(1962) op.cit., p.362

provisions directed by another legal system's public policy and underlying moral attitudes, continue to guide regardless of changing circumstances. The institution of a new state, with its own morality and a unique religious identity has not altered it for quite a while. This predicament presents the opportunity to examine forces and motives behind the legislative process, in the overlap period and regarding the new legislation.

It should be considered that according to conflict theories of law, such as Sellin's, laws imposed following colonisation examplified "a primary cultural conflict"[15]. Under these circumstances, the law would presumably reflect the dominant culture and not a consensus. Therefore, determining the extent of the maintained former British law in the original Israeli legislation, despite the legislative independence, would be significant in analysing which values and norms were imported and imposed and which have been accepted. Adherence to certain provisions can be just as meaningful for this purpose as departing from them.

The Criminal Code Ordinance,1936

As seen, the English law regarding prostitution before the Wolfenden Report had been an assemblage of different legislative efforts, almost none specifically intended to encounter prostitution[16] , specific legislation being local and sparse. The offenders were usually charged with causing annoyance by loitering or soliciting in a public place for the purposes of prostitution. Only by the end of the 1950's was a comprehensive statute introduced. Hence, the Ordinance, as other Mandatory legislation, is interesting in being a codified version of the uncodified law. However, a detailed reference is unnecessary, when similar concepts have been discussed before.

Guidance towards England was achieved through reference to the principles of legal interpretation obtaining in England, and prescribing that expressions would be presumed to be used with the meaning attached to them in English law, unless otherwise expressly provided[17] .

Procuration for Immoral Purposes

Chapter 17 of the Ordinance, in division III "Offences injurious to the public in general", encountered allied offences, including brothels, living on the earnings of a prostitute and procuration, but not prostitution itself. Other offences under the same heading, "Offences against morality", included rape, indecent acts, abortions, and obscene publications.

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[15] For a review of conflict theories see Vold,G.B. & Bernard,T.J., (3rd ed., 1986) , from p.269.

[16] e.g. the often used Vagrancy Act 1834.

[17] CCO 1936, S. 4.

The CCO proscribed variations of procuration for immoral purposes or to become a common prostitute, and attempts to procure[18], all categorised as misdemeanors, namely, punishable with imprisonment for more than a week and less than three years.[19] Using a similar formulation. S. 162 introduced the offence of procuring a female to have unlawful sexual intercourse by unfair or illegal means, provided she was not known to be a common prostitute or of known immoral character.

The term "common prostitute" was not defined. Comparably, in England, although it had been used in statutes since 1824, and a judicial formula evolved, criticisms still attacked the vagueness and the stigma.[20] The criticism would have been particularly relevant here, where reliance on English precedents is more remote. Similar criticisms could apply to the other term, "not...of known immoral character", using, as in the chapter title, the vaguest and most controversial element, "immorality" (or "morality").

All the variations of the offence, except regarding sodomy, specify that the victim should be female, excluding procuration of males.

This part of the Code is rather similar to the procuration offences in the SOA 1956[21]. The major difference, besides a slight one regarding punishment, is in the protection of the under aged, mentally defective and those subjected to unfair and illegal forms of procuration under the SOA, compared to the wider scope of the Ordinance, where only two of the offences covered under-age victims. That, and the severe punishment, unmistakably expressed the view that this crime was "particularly vicious"[22]. As argued elsewhere, the concern for vulnerable groups, whose consent may be lacking, along with the apparent consensus, may justify the provisions (supposing that prostitution is an occupation that should be avoided). Wolfenden Committee's recommendation, for example, to maintain the existing laws was not wholly unjustified even by the standards of its philosophy .[23] In all other cases, justification for a wide criminal liability and severe punishment would be less sound.

Section 162 is an example of the difference caused by translation, deliberately or not. While elsewhere in the law "common prostitute" and "of known immoral character" were translated literally, here "Wanton" replaced "common prostitute", and "known immoral character" translated into "vicious" or "corrupt", terms that expressed a greater degree of contempt towards this conduct. However, the title of the section (which is not regarded as official) in the English

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[18] CCO 1936, S. 161.

[19] As "misdemeanor" is defined as "...not a felony or a contravention". CCO 1936, S. 5.

[20] see The Wolfenden Report, para. 258.

[21] S.3,4,21,22,23,27 and 29 of the Act.

[22] Hall,J.G. (1958) , at p.176.

[23] The Wolfenden Report, para.344.

version read "procuring *defilement* of females", which was an unusually judgmental term in itself. Social emotions were embodied in the law in an overt way which would be quite inconceivable now. Perhaps this blatant phraseology, which today appears very "politically incorrect", was just a less hypocritical wording, valueable in leaving no ambiguity concerning the legislator's meaning. In England, particularly in the SOA, the element of immorality was less pronounced, although undeniably it had affected the legislation, and its implied expressions have been analysed earlier. The previously suggested model, by which the ponce, the middleman, has been the most despised and the prostitute followed, is reconfirmed by these Mandatory provisions.

Furthermore, s.162 reflected a view that the prostitute was not worthy of the law's protection from being threatened or misled into having unlawful sexual relations, including attempts to "recruit" her by using threats or even drugs, as if by practising prostitution she lost control over her body, her autonomy. Given this study's stress on the importance of autonomy, any provision based on such underlying assumptions can not be justified.

Premises

The only definition included in this chapter was of a brothel as "any house, room or set of rooms in any house which is occupied or frequented by two or more females for the purpose of prostitution"[24], based on common law concepts, similarly to the other provisions. As seen, the Wolfenden Committee, discussing premises used for the purpose of prostitution, cited precedents which had defined a "brothel" likewise.[25]

The formulation of the offences of keeping or managing a brothel, or acting or assisting in the management, or permitting the use of the premises, or letting it with the knowledge that they would be used as a brothel[26] , was almost identical to the later one of the SOA 1956[27] . The remarkable similarity included using the undefined term "habitual prostitution", and the gradual penalties for repeated offences, with a maximum of six months imprisonment or a fine of 250 pounds or both. While the term of imprisonment was not particularly long, it was almost certain to be imposed since the fine was huge, compared to other offences under the same heading which carried a fine of only five pounds[28] . Furthermore, as remarked previously, denial of freedom for any duration is the severest punishment and should therefore be wholly justified.

Both statutes did not specify whether a prostitute could be convicted of the offence. The

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[24] CCO 1936, S. 151.

[25] The Wolfenden Report, para. 291-297.

[26] CCO 1936, S. 163.

[27] SOA 1956, s.33, 35, 36.

[28] e.g. CCO 1936, S. 167.

Wolfenden Committee, when discussing this question, mentioned common law precedents that established that she could not be convicted.[29] This point will gain importance later, when the Israeli law diverts from it.

The CCO was apparently progressive in applying a presumption concerning the landlord who continued to rent the place to the same person[30], who would be deemed a party to any subsequent offence. The lack of such a provision in the SOA led to a recommendation made along the same lines by the Wolfenden Committee .[31]

Yet another example of the perceiving brothels as corruptive, and another provision (along with the offence of living on the earnings of a prostitute) depriving prostitutes of basic rights, appeared in the offence of permitting a child (between the ages of two and sixteen) to reside in or frequent a brothel, affixing a substantial penalty of six months imprisonment or twenty five pounds fine[32] . A mother could not take her child to her working place. This provision needed no further explanations since it encountered a special position of the offender (custodian of the child, or taking care of him) that apparently put her under a special obligation. The corruptive element, however, (i.e., the harm) is questionable.

Another problem of justification concerns the offences of detention with intent that the woman may have unlawful sexual intercourse, or in a brothel, and the offence of constructive detention by withholding clothes[33], defining the perpetrator as "any person", either male or female. Although the provision would have been justified by any legal theory, since it covered situations of coercion, physical detention and the denial of the woman's right to exercise her free will, the fundamental question, as regarding various other offences, is whether other existing criminal provisions were not sufficient, why a special provision was needed. The recurrent explanation, probably applicable here, evoked the social repugnance.

As the Wolfenden Committee resisted most of the proposed changes in this context, these laws have remained similar for a long time in England and Israel.

Living on Earnings of a Prostitute

The moral condemnation of the ponce had been reflected in the Mandatory Code in exactly the same way as it was incorporated into the English law later, through provisions that seemed to have transcended the extent necessary to prevent exploitation or coercion. The CCO provided

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[29] The Wolfenden Report, para 318.

[30] CCO 1936, S. 164.

[31] The Wolfenden Report, para 327.

[32] CCO 1936, S. 165.

[33] CCO 1936, S. 171.

the misdemeanor of a male living on the earnings of a prostitute, and a presumption that he shall be deemed to be knowingly living on the earnings of a prostitute in certain circumstances[34]. A parallel offence existed for a woman perpetrator[35] . The provisions were identical to those of S.30 and S.31 of the SOA 1956, except for the punishment, the maximum penalty according to the CCO for misdemeanors being three years imprisonment, while the maximum penalty of the SOA was mitigated, two years imprisonment, raised by the SOA 1959, to seven years. As this disparity emanated from a general sentencing provision of the Ordinance, it is hardly significant, and may only suggest that the Mandatory legislator did not see it as an offence requiring a separate scale of punishments.

Although mens rea was not specified in the offence, the presumption added the requirement of "knowingly". The English equivalent, S. 30 of the SOA 1956, provided the same, although adding the knowledge requirement in the definition of the offence itself along with the presumption. However, this too does not seem to be a significant change, as the element exists in any case.

Consequently, critiques of the Sexual Offences Act could just as easily fit the CCO. The fear of exploitation, the very low status of the ponce, disregard for the human need of prostitutes for a partner, and underestimation of their capability to make a free choice, all these factors are just as relevant in the present context. Similarly pertinent are questions of justification that were raised following Wolfenden's recommendation not to change the law, which was blurring the distinction between "public" and "private". In both cases, the wide scope was not limited to preventing exploitation and coercion. As these points were deliberated elsewhere, they are only mentioned to highlight the implications of the similarity between the laws.

Street Offences - Solicitation

S. 167 (1) provided that any person who, by word or gesture, solicited for immoral purposes any person who was in a public place, would be guilty of a misdemeanor and liable to imprisonment for one month or to a fine of five pounds.

S.167 (2) provided the offence, concerning a guardian of a child under the age of sixteen years, to aid or abet such child to commit the aforementioned offence.

As the child's gender was defined as "whether male or female", implying a possible male solicitation, and since ss.(1) specified the perpetrator as "any person", the law could be regarded as gender-neutral. Theoretically, the offence of solicitation, which was not restricted to

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[34] CCO 1936, S. 166(1), 166(2).

[35] CCO 1936, S. 173.

female prostitutes, could equally apply to customers or male prostitutes. Furthermore, the scope of the offence was not limited by the element of purpose, using "immoral purposes" and not the more specific "for the purpose of prostitution", unlike, for example, the Metropolitan Police Act 1939 or the SOA 1959. Another offence which could have been applied to customers is indecent suggestions made by "any person" and directed at "any person under the age of sixteen or to any female"[36] . These are just hypotheses, as cases applying this section were not found. This non-gender-specific formulation, however, will be abandoned in English and Israeli later laws, and will generate later struggles, the first of them, as mentioned, concerning the formulation of the offence of soliciting for the purpose of prostitution according to the SOA 1959[37] .

Additionally, the provisions, in contradiction to the contemporary English local laws, did not require proof of nuisance or annoyance. In England, this requirement was only abandoned following Wolfenden's recommendation[38] , but the issue has been evoked frequently ever since. Compared to s.32 of the SOA 1956, discussed previously, there was no requirement of persistence. Nor was there any cautioning system. It may be concluded that the provision may have lacked certain safeguards but it nevertheless presented an example of a working non-gender-specific law.

These offences, the main tool of charging the prostitute herself, had been maintained for decades, since they were not repealed by the 1962 Law, only in 1977.

The inclusion, regarding soliciting, of the words "by word or gesture"[39] exemplified the legislator's attempt to follow Common Law developments. In England, interpretation of "soliciting" referred to judicial interpretation of the term in the Vagrancy Act 1898[40], holding that the "soliciting" in this connection covered not only spoken words but also movements of the face and the body.[41] The meaning was said to be the same in the SOA 1959.[42] This wide interpretation was clearly implied in the CCO.

The CCO defined a "Public place" as "...includes any public way and building, place or conveyance to which, for the time being, the public are entitled or permitted to have access, either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meeting, or assembly or as an

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[36] CCO 1936, S. 168.

[37] SOA 1959, s. 1(1).

[38] The Wolfenden Report , para.274

[39] CCO 1936, s. 167 (1).

[40] Vagrancy Act 1898, s.1(1)(b).

[41] Sion,A.A. (1977) , p.83.

[42] *Burge v. DPP* [1962] 1 All.ER 666.

open court"[43] . The absence of definition in the SOA 1959, or the Common Law[44], was discussed before. Reference to interpretation of the term regarding other offences had to be confined to those which coincided with the purpose of the Act. Precedents emphasised the accessibility of the place in fact to the public at large.[45] The Ordinance's definition apparently intended to cover similar ground. As the certainty of the law has been repeatedly stressed, the attempt to define such a basic element is undoubtedly welcomed.

Conclusions

It could be assumed that the penal policy embodied in the CCO would include necessary but insignificant departures from the contemporary English law, changes that would have been the result of the codification of a body of precedents, Common Law, and local laws. The conclusion of the comparison is that the Ordinance, and thus Israeli law until the early 1960's and beyond, was indeed quite similar to the English law as it had been before the Wolfenden report, particularly to the provisions of the SOA 1956. Quite surprisingly, there were also no noticeable discrepancies compared to the SOA 1959, although enacted two decades later. This conclusion may diminish the alleged innovation of the Wolfenden Report and its legislative adoption, at least in this context, and support observations regarding Wolfenden's departure from its philosophy. The basic concept, criminalising activities surrounding prostitution but not the occupation itself, along with the operative elements, moral stands and their legal expressions, were quite similar. Even the maximum penalties, occasionally higher than was the norm in England at the time, although there was not a progressive system of penalties, seem to accord with Wolfenden's recommendations to increase punishment.[46] This point is particularly evident when considering the provisions concerning allied offences which were not rejected by Wolfenden, despite their invasive nature. The analysis shows just how deeply rooted the principal notions had been, how conservative the Committee's attitude was in supporting them.

The less elaborate nature of certain provisions, and the more general terms used, may indicate that the Mandatory legislator was far less interested in street offences than later legislators, English or Israeli, as the attitude and intentions reflected in the law may imply a degree of tolerance towards prostitutes and their trade. The proportion of offences concerning prospective exploitation was far greater, as would be sought by modern critics (presumably without the use of the derogatory terms, though, and with several modifications), as would be the general formulation of the solicitation offence.

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[43] CCO 1936, s. 5.

[44] See *R v. Morris and others* (1963) 47 Cr.App.Rep.202

[45] Sion (1977), p.85.

[46] Regarding soliciting: The Wolfenden Report , para.275-276.

The only main feature of the Wolfenden Report and 1959 Act that was evidently missing from the CCO is the rehabilitative aim, expressed in the controversial cautioning system and the recommendation to get social reports. A moral neutrality of the Mandatory legislator may be argued, as preceiving the prostitute as a creature requiring treatment certainly took the law into the morally paternalistic realm. A detailed account of criticisms and justifications is unnecessary, as those were fully discussed elsewhere, and as they did not seem to have been raised at the time. Only potential retrospective objections are left.

The fundamental conclusion of the comparison is that the basis of the Israeli law was unexpectedly similar to the English law in what would be later considered its "permissive era", but without the surrounding theoretical discussions and justifications. Concerning the important aspect of gender and purpose neutrality of soliciting offences, the Mandatory law may even be regarded as more advanced than contemporary laws, in containing a single solicitation offence. As seen before, one of the major issues discussed by different English committees, especially the 1984 CLRC, was the suggested unification of the three existing offences: soliciting by women for prostitution purposes, soliciting by male for immoral purposes (s. 32 of SOA 1956 mostly confined to homosexual solicitation), and kerb-crawling. The CCO, whether intentionally or not[47], presented such a unified offence.

[47] The lack of judicial decisions does not permit conclusions regarding its practical function.

Israel - Legislative attempts

Introduction

The Penal Law Amendment (Prostitution Offences) Law, purporting to cover all the offences connected with prostitution, was passed in 1962.[1] This law repealed most of the relevant provisions of the CCO.

The amendment was passed through the Knesset[2] a short time after the Wolfenden Committee had submitted its report, and the SOA 1959 was enacted. It was also done concurrently with the heated English discussions about relationship between morality and law. Had any of these factors affected the Israeli situation? If not, what had?

Most of the provisions were later incorporated into the Penal Law, 1977[3] , the codification of the substantive criminal law that has replaced both the CCO and the subsequent original legislation. Therefore, retained 1962 provisions will be discussed jointly with the 1977 law.

As in England, parallel forces of legislative efforts, judicial interpretation, official committees, and critiques, have all shaped the law. To facilitate comparison, recommendations of the Ben-Ito Committee[4] and the subsequent provisions of the 1992 Bill, the latest of numerous bills which have not been passed into law, but which have been remarkably similar, will be reviewed along the provisions of the laws. An introduction to the different legal constituents will therefore precede the investigation of their exact contents.

Penal Law Amendment (Prostitution Offences) Law, 1962

The Penal Law Amendment (Prostitution Offences) Law was a private bill, proposed by MK[5] Nir. After deliberations in the Constitution, Legislation and Judication Committee[6], a revised bill, including more provisions and a grander aim, was presented for Knesset approval,.

The professed intention behind the revision was to unify the original proposition, which had concentrated upon prescribing severer penalties for ponces, and the provisions of the CCO, so

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[1] Penal Law Amendment (Prostitution Offenses) Law, 1962.

[2] The Israeli parliament

[3] Penal Law, 1977.

[4] "Ben-Ito Committee", Report of the Committee for reviewing the problems of prostitution (1977).

[5] Member of the Knesset.

[6] Hereinafter referred to as the CLJ Committee.

as to form one homogeneous law.[7] The allied offences of living on the earnings of a prostitute and procuration were thus accorded primary importance. Contrary to the wide scope suggested by the law's title, the CLJ Committee did not scrutinise other areas, including street offences, or the justification of the very existence of those provisions. The situation was therefore very different from the English one, particularly referring to the Wolfenden Committee[8], whose ostensible interest, as seen, concerned street offences, justifying it by the crucial distinction between public and private. Would this lack of similar theoretical justification lead to any substantial differences?

The Ben-Ito Committee, 1977 Report

The committee, headed by Hadassa Ben-Ito, one of the first female Supreme Court judges, could be seen as the equivalent of the Wolfenden Committee, being the first serious discussion of legislation regarding prostitution and allied offences. Indeed, the Committee pondered the relationship between law and morality, extensively citing the Wolfenden Report and its philosophy. The apparent justification for this reference was the derivation of the Israeli law from the English system, and the premise that the controversy following the Report had represented a wide divergence of opinion not dissimilar to that existing in the Israeli population.[9] The Committee also relied on Dr Sion's research, mentioned earlier[10] . The years that had passed since the Wolfenden Report and the 1959 Law were seen as beneficial, allowing an evaluation.

However, how fundamentally similar were the Israeli and the English predicaments? And how wide was the actual range of opinion represented by the Committee or existing in society? The Committee asserted that opinions extended from the religious, vehemently opposing prostitution, to support of women's autonomy.[11] Yet, although the religious stance has been expressed frequently, compared to England, feminist commitment, greatly responsible for a general awareness of women's rights, seemed to have been weaker. Feminist legal writings rarely appeared before the 1990's, while this may have been the English situation during the 1950's, as seen. The Israeli range of opinions was therefore narrower at the time, and the balance different. Besides implications to the Ben-Ito Report, this observation certainly urges another review of the situation, while reliance on an aged report is highly unsatisfactory.

The overall negative attitude of the Report confirms this assessment. Thus, the Committee promptly declared that the public saw the practice of prostitution as an undesirable phenomenon

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[7] D.K., (34) 1962, p.1923. "D.K." stands for Divrey Kneset (Protocols of the Knesset discussions)

[8] The Wolfenden Report, para.229

[9] The Ben-Ito Committee Report, (1977), at p. 6.

[10] Sion,A.A. (1977) .

[11] The Ben-Ito Committee Report, (1977), at p.7.

that should be deterred and treated, even if by means other than the criminal law, although it could not be expected to be eradicated. "We all agree that prostitution is sordid".[12] This patronising attitude was reflected in paternalistic recommendations, expressly those concerning minors and treatments, but it probably had just as powerful, although indirect, influence on other provisions. Criminal liability may have not been the appropriate strategy to encounter all aspects of prostitution, but the Committee nevertheless attempted to apply it, especially regarding minors, in a most invasive way, as will be seen.

Another agreed assumption was that after all has been done to deter the young, adults should be able to practice prostitution without fear of coercion and in humane conditions, while as far as possible refraining from hurting the public. However, could improved conditions be realistically expected when the basis had been so negative? And would not public opinion, sustained by the Committee's prejudicial remarks, maintain the undesirable link between prostitution and other criminal activities, by classifying it under the same label? Acceptance of the declaratory power of the law, discussed earlier, would support this view. Presumably, official policy expressed in a much publicised Report would have some persuasive power of its own.

Regarding the desirable relationship between law and public opinion, the Ben-Ito Committee held that the law should balance between beliefs, not that the stronger interest would reign[13] . Accordingly, they aimed to achieve recommendations that the "majority of the population could live with", ignoring that the majority would often have the stronger interest. This declaration of intentions could mean a wholly dissatisfying compromise, or, alternatively, legislation of moral attitudes only because they conformed with the supposed majority's view. Thus, despite the reference to Wolfenden's philosophy, the Committee left a loophole that would enable it to avoid adherence. Moreover, as the notion of "public opinion" has been vague (the Wolfenden Report itself mentioned its elusiveness[14]), even more so when no research had been commissioned, it probably represented, and used to justify, mainly the attitudes and assumptions of the Committee's members. As the Committee ostensibly intended to reduce the law to the 'minimum necessary' restrictions, which could be strictly imposed, the term "necessary" could acquire various contents according to different perceptions. The danger is, as mentioned regarding the declaratory theory, that the criminal law be misused as "a powerful means of inducing people to believe that a given type of conduct is strongly condemned by their peers"[15] while actual condemnation may be lesser, or the legal involvement unjustified. It seems, then, that the Committee may have provided more moral guidance than intended.

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[12] Ibid. at p.9.

[13] Ibid.at p.6.

[14] The Wolfenden Report, , para.16.

[15] Walker, N. (1987) , at p152.

Nevertheless, reactions to the Report, of religious people and liberals alike, were expected to be exasperated, interpreting even the slightest relaxation as legitimating prostitution[16], a view that, considering the reality, exemplified the hypocrisy dominant in this area. Since no legislation followed, hopes for influence of the Report in the social sphere[17] have been shattered.

As the subsequent bills have adopted the proposals, specific recommendations will be reviewed where relevant. There is one further point which should be made. Although the Committee was appointed in February 1975, it submitted its recommendations only in April 1977, soon after what was to be known as "The shake up", the right wing Likud party winning the election after years of left-wing reign. Would the future of the bills have been different had the Committee submitted its report earlier? One may only speculate. Since then the Ma'arach has returned to power, and lost it again, but other effective processes, particularly the strengthening of the religious parties, have occured, so the opportunity may have been missed.

The Committee On The Status Of Women, 1978

The Prime Minister Office's Committee on the Status of Women reacted to Ben-Ito's Report soon after its delivery.[18] This Committee condemned prostitution harshly, without suggesting allowing this apparently indestructible trade some humane conditions. A surprising comment, considering the context, regarded the street prostitute as having "an immature personality and faulty decision making faculties".[19] Such a perception certainly validated legislative over-protection and paternalism. In England, as seen, portrayal of prostitutes as mental defectives that had an "impaired moral judgment", therefore incapable of pursuing their own good[20], had been largely dismissed, at least outwardly. A vicious circle would be created, as this view could support improper laws, which would drive prostitution to even less humane conditions and to a deeper public contempt which will, again, support harsher laws.

The full implication of social labelling theories and the link between stigma, low self esteem, and association with other criminal activities, readily surrounding prostitution[21], was apparently not recognised by the Committee. Paradoxically, it was claimed that legalised prostitution would only perpetuate the stigma and the inferior position of prostitutes[22] . If this official body,

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[16] A.P. (1978) .

[17] e.g. Ibid., at p.184.

[18] Recommendations of the Committee on the Status of Women, Prime Minister's Office, (1978) ch.4: "The woman who practices prostitution".

[19] Ibid. at p.106.

[20] See Cowan,R. [1956].

[21] See a review of social reaction theories of criminal behaviour in: Vold,G.B. & Bernard,T.J., (3rd ed., 1986) , from p.252.

[22] Summery of discussions and findings of The Committee on the Status of Women,1978. p.254.

presumed to enhance women's position, portrayed prostitutes as psychologically flawed, unfit mothers, susceptible juveniles, why would anyone else regard them differently?

The Committee's recommendations were generally concerned social welfare, rather than law. Thus, the main recommendation was to establish shelters for prostitutes, expressing rehabilitation hopes despite the grim prospects. Other suggestions will be reviewed.

Legislative Developments - Bills

The Israeli political map, obviously influential to any legislative attempt, has been variable. A variety of parties have constituted the Knesset. Two main large parties have existed: the Likud (right wing) and the Ma'arach (Labour), and numerous smaller parties. Mentioning them all is impossible and unnecessary. The importance is that certain parties have been religious, thus expressly incorporating a religious element into the political arena, of particular significance during coalition crisis. Specific instances will be brought.

Another point to remember is that despite the continuous attempts, however controversial the issue has been, not even half the 120 members of the Knesset have turned up to the votes.

The 1979 Bill

Since the 1979 Bill, ensuing Ben-Ito's Report, was duplicated in the later 1990 Bill, which will be reviewed in depth, going into detail seems unnecessary, except for the general picture of the Knesset discussion before the bill has "disappeared" in the CLJ Committee. Briefly, there were three reformative provisions: allowing for discreet advertising, recognising male prostitution and allowing to practice prostitution in separate premises.

The background was a growing nuisance caused by prostitutes soliciting in public places. The extent may be inferred from a question directed at the Minister of Interior Affairs[23] , what steps had been taken by the police regarding particular gatherings of prostitutes[24]. The specified places exemplified the largely ignored consequences of the existing provisions, driving prostitutes to uninhabited and potentially dangerous places.

The Minister replied that the police were charging the prostitutes with causing public nuisance to residents or road traffic for the purpose of practising prostitution[25] . Customers risked getting

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[23] The equivalent of Home Secretary.

[24] D.K. (86) 1979, p.3459.

[25] Penal Law, 1977, S.215(c).

traffic tickets, had they breached traffic regulations. The Minister did not explain this different attitude, the gap between a criminal conviction and a traffic offence being huge. However, he did express his opinion that the law should be aggravated regarding prostitutes and ponces[26]. The Minister, Y.Burg, was a leading member of the largest religious party. His position showed that religion, too, has condemned customers less than the other participants.

Despite the declared intention to follow the Ben-Ito Committee's recommendations, regarded as apolitical and impartial, the 1979 Bill was not governmental, it was brought by Sara Doron, a member of the Likud party, and a group of other MKs, from across the political map. Apparently, it was thought more likely to pass sooner this way.[27] A similar procedure was used in England regarding the SOA 1985, a similarly sensitive enactment; there, however, the government supported the Bill. It could be a strategy to avoid direct governmental involvement in controversial matters. Thus, MK Pail, who belonged to a left wing party, remarked that "such a pure government does not deal with prostitution".[28] This latter explanation seems accurate considering later developments, or, rather, lack of them. The ambiguity that has been observed in England seems even stronger here. While public pressure required action, no government has been too keen on taking a political risk of infuriating voters or coalition members with any radical measures.

MK Doron considered that the relevant criminal law should be limited to three functions: to keep public order and appropriate behaviour in public places, to protect the citizen from harm or harm to his feelings, and, thirdly, to protect from exploitation, especially of the vulnerable. The Wolfenden Report's call to discourage young girls from practising prostitution, by helping and advising, was cited.[29] The basis was awareness that prostitution may never be eradicated[30], therefore it should not be unnecessarily criminalised, while it may still be, and should be, discouraged. The moral tone behind this ostensibly pragmatic attitude is undeniable. Although most of these parameters have been endorsed earlier as the justifiable objects of criminal legislation, the vague 'harm to feelings', bound to be even more controversial in a society where religion has been a political force, evokes questions.

Although the Minister of Justice urged the MKs to read the Report and the Bill carefully, since some proposals had actually been rather restrictive[31], general opinion nevertheless regarded the Bill as legalising prostitution. The religious parties were terrified by the idea that practising

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[26] Ibid.

[27] Ibid, p.3497. per S. Tamir, The Minister of Justice.

[28] D.K. (86) i 1979, p.3496.

[29] Ibid.

[30] Ibid. p.3496.

[31] Ibid. p.3497.

prostitution would be permitted in private premises and in hotel rooms.[32] This public extremism, observed before, including regarding the English 1967 Act, would rise again in the 1990s. Whenever emphasis, particularly through the media, has been on relaxed provisions, restrictive aspects have been ignored, and legislation has not gained the support it presumably would have had scrutiny been careful. This exaggerated concentration on essentially minor details in a broader policy, could be described as a moral panic. Consequently, obvious political apprehension of being regarded as permissive has been crucial in this legislative process.

Criticism, however, was not exclusive to religious parties. S.Shamir, a right wing MK, attacked the Bill's pragmatism as superficial, avoiding problems instead of tackling them, "a mental prostitution" that was flattering the corrupted parts of society.[33] Shamir equated permissiveness with vice, arguing that prostitution should be fought, not embraced. He regarded it in the wider perspective of a loss of values in Israeli society[34]. Although he did not phrase his opinion in a legal way, he clearly thought that the law should lead the public by providing moral guidance, by further criminalisation.

The decision to transfer the Bill to preliminary discussions in the CLJ Committee was won by one voice. That was the last that was heard of this Bill, although it could have provided a discreet way of practising prostitution, lessening the nuisances while putting male and female prostitutes on a par.

The Penal Law (amendment)(prostitution offences)Bill,1990

The 1990 Bill, a duplicate of the 1979 Bill, was another private bill of a group of MKs from different parties.

The renewed public attention was evoked following the Russian immigration into Israel, that caused a prosperity in prostitution, and the AIDS disease. The latter has been connected to prostitution, and its political relevance was mentioned regarding similar concerns in England, and morality in the Thatcherite New Right era.[35] In the preliminary discussion, MK Poras, who sponsored the Bill and spoke for it, said that according to the Ministry of Public Health, there were seven HIVpositive prostitutes, and preventing an epidemic would, presumably, be only achieved by some sort of regulation[36] . He asked the religious MKs not to vote at all, as they would not vote for it, claiming that it was no longer a matter of corruption but of life and death.

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[32] MK Z. Varhaftig, Ibid.

[33] Ibid.

[34] Ibid. p.3498.

[35] Newburn, T. (1992) , p.187.

[36] D.K.(122)1991, p.4244.

He seemingly attempted to 'neutralise' morality, perhaps the best strategy to pursue an ostensibly radical proposal. However, that was not entirely successful.

The stance of the government, delivered by the Minister of Justice, acknowledged that the involved issues, public, moral, social and criminal, were all controversial. Consequently, the government did not considered the time was right to replace the law[37] . Fear of a coalition crisis was evident. However, a majority (23 against 15) voted in June 1991, in favour of passing the Bill to the CLJ Committee. The Committee, again, did not bring the Bill back to the Knesset for the first voting, due to unspecified hindrances. The latest formulation will be reviewed next.

The Penal Law (amendment)(Prostitution offences)Bill,1992[38]

In December 1992 the last version of the Bill was brought before the Knesset for preliminary vote[39] . The Bill was sent to the CLJ Committee after 26 MKs voted for it, the balance being remarkably similar to the previous vote.

Contrary to past experiences, this time MK Poras, presenting it to the Knesset for the second time, announced that the government supported the Bill. While in the former Knesset, he had belonged to a small left wing party (Shinuy[40]), this time he was a member of Merez- a union of several left wing parties. In the ensuing period since the last vote, the Labour party won the elections and, heading a coalition comprising of Merez and one relatively moderate religious party, formed the government.

The chairman of The Ministers Committee of Legislation, which sets the government's position, the Minister of Justice, declared support for the Bill. Yet the decision may have been appealed, in which case it would bind the government only after the appeal has been discussed. Since a religious minister, A.Deri, intended to appeal, the Bill was voted for once again without governmental support[41] .

The points raised by supporters of the Bill are not new to this discussion. MK Poras stressed that the Bill was not legalising prostitution. Its aim was to change the absurd situation in which practising prostitution was forbidden in private and allowed in public places[42]. The Minister of Justice, a member of the Labour party, declared that the fight against prostitution had failed, and

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[37] Ibid, p.4245. per D.Meridor.

[38] Penal Law (amendment)(prostitution offences) Bill, 1992. Hereinafter cited as '1992 Bill'.

[39] D.K.1992, p.863.

[40] "Shinuy" significantly means "a change".

[41] D.K.1992.p.865

[42] Ibid.

that this fight had been sanctimonious[43] . Prostitution, although ostensibly legal, it was argued, was limited by the law in unreasonable ways, prosecuting the prostitute, but not the customer.[44] Accurate as this analysis were, would the Bill offer a genuine remedy?

The Minister of Justice mentioned two factors whose influence is to be examined more closely: the connection between prostitution and organised crime, resultant of the need to use ponces, to overcome soliciting prohibitions, and lack of medical control, especially considering AIDS.

Reservations came from left as well as right. Thus, MK Lass (Labour) claimed that the only way to achieve medical security would be to compel using condoms[45] , a ludicrous proposal whose unenforceability was mocked, even though it was hardly more invasive of privacy than some of the proposals that were mentioned regarding the situation in England.

Most reservations, however, consisted of arguments that have been frequently encountered. Members of the religious party Mafdal expressed the fear that the Bill would lead to widespread prostitution.[46] MK Poras answered that it would neither increase nor reduce prostitution, but would only change its nature, taking it off the streets and into reasonable, private places. Another supporter of the Bill, MK Segev, a member of a non-religious extreme right party, Zomet, remarked that researches had shown that regulation of prostitution led to decreased trade, since the thrill caused by the prohibition drove some of the customers.[47] However, as the religious' parties resistance was based on deep moral beliefs, not practical considerations, even cogent arguments could not possibly matter.

The Bill's proposals, as those of the preceding bills, were based on the Ben-Ito Report. Therefore, for extensive explanations, lacking from the Knesset discussions, the Report will be probed. One may persuasively argue that a Report that was composed nearly 20 years ago is not an appropriate foundation for legislation, especially when numerous pertinent social changes have occurred in recent years. However, a better alternative does not exist, even if it is a practical consideration overriding a serious theoretical criticism. Furthermore, paradoxically, despite the professed extensive reliance on it, the Report itself has not been often scrutinised, as became evident during the Knesset discussions when even supporters of the bills could not always defend their position coherently, a particular danger regarding such an emotional subject, where attention has been diverted from legal issues anyway.

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[43] Ibid. per D.Libai.

[44] Ibid.p.864.

[45] Ibid. p.865

[46] Ibid.p.867

[47] Ibid.

ISRAEL - THE LAW

Living on the earnings of a prostitute

S.1 of the 1962 Amendment, s.199, 200 of the 1977 Penal law.

Justifying the scope of criminal law intervention has always been complex in this context, which has trodden dangerously on the private realm, but has evidently attracted an almost consensual degree of contempt, therefore, less criticism than it ought to. Has the tension that has been recognised in England, more manifestly in legal theory than in legislation, between the role of the ponce as a normalising element in the prostitute's life and, adversely, the threat of exploitation, been recognised by the Israeli legislator?

The Penal Law Amendment provided the offences of living, wholly or in part, or for any period of time, on the earnings of a prostitute[1], applying a presumption[2] , and of knowingly receiving something that has been given for an act of prostitution of a woman, or a part of something that had been so given[3] . The maximum penalty is five years imprisonment, raised under certain aggravating circumstances (a woman under 18, or relationships whereby the offender has authority) to seven.

The intention of the CLJ Committee, to prescribe seven and ten years respectively, had been amended as a ten years sentence could only be imposed by three judges, following criminal procedure rules, an unreasonable load for the already stressed courts[4]. Hence, the only hindrance for even more extreme penalties was a technicality, demonstrating the Knesset's bias.

The severity of the penalty is stressed, first, as this had been the motive behind the Bill[5] , and secondly, because the much increased punishment, raised from a maximum of three years prescribed by the Ordinance, reflected an inclination similar to that of English developments. While the original s.30 of the 1956 Act had prescribed a maximum of two years imprisonment, and the majority of the Wolfenden Committee recommended its retention[6], Parliament raised, in

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[1] Penal Law Amendment (Prostitution Offences) Law, 1962, s.1(a)(1). Penal Law, 1977,s.199(1).

[2] Penal Law Amendment (Prostitution Offences) Law, 1962, s.1(c). Penal Law, 1977,s.200.

[3] Penal Law Amendment (Prostitution Offences) Law, 1962, s.1(a)(2). Penal Law, 1977,s.199(2).

[4] D.K.1962, p. 1925.per Nir-Raphaelks, on behalf of the CLJ Committee.

[5] D.K.1962,p.1923. per Azania,B. on behalf of the CLJ Committee.

[6] The Wolfenden Report, para..307. As seen, An all- female minority supported an increased punishment of five years: Ibid. at p.128, in order to deal with expected increased commercialization and exploitation.

the SOA 1959, the maximum to seven years' imprisonment[7] , a severer penalty than the five years' term proposed in the Street Offences Bill. The Street Offences Bill was discussed in the House of Lords in 1958-1959, remarkably close to the 1962 Law.

While criticisms directed at the Street Offences Act are obviously applicable[8], the similar grounds, the contempt towards the ponce, is even more blatant in the Israeli law, considering that the provision is not only more punitive, compared to the preceding law, and the English one, but also more criminalising, having had a wider scope. The disproportionality of the sentence was worsened by making imprisonment mandatory[9].

The offence is wide both in its application regardless of perpetrator's gender, and in the liability ranging from living on the earnings of a prostitute to the seemingly petty offence of receiving something that has been given for an act of prostitution, facilitating convictions of middlemen. Furthermore, following general rules of criminal law, even if payment has not been received, a charge of an attempt could still be brought, as long as the "overt act" had been committed.[10]

Liability has been extended by providing that for the purpose of the section it shall be immaterial whether the received thing has been money, money's worth, a service or any other benefit, whether it was received from the woman or from any other person, and whether the actual payment for the act was received, or a substitute[11] . The legislator clearly sought to cover every conceivable transaction between the prostitute, her ponce and the customer. However, despite this wide scope, only the ponce has been criminalised, ignoring the other necessary participant, the customer.

Following the widening definition of "a prostitute", the limits of "an act of prostitution" have ostensibly been widened too. This expression appears in the offences of receiving something that has been given for the act of prostitution[12], the foregoing discussed provisions[13], instigation to an act of prostitution[14], and letting a place for the purposes of acts of prostitution[15]. According to precedents, "an act of prostitution" is not necessarily an act of "a prostitute". It is not defined

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[7] SOA 1959,s.4.

[8] Claims that the measures were disproportionate to penalties for other offences and that they resulted from political considerations rather than legal theory were discussed regarding the 1959 Act.

[9] Penal Law Amendment, 1962, s.10. The section will be discussed later.

[10] Cr.A. 534/69, *Friedman v. State of Israel*, 24(I) PD169.

[11] Penal Law Amendment (Prostitution Offences) Law, 1962, ss.1(b)(1), 1(b)(2), 1(b)(3). Penal Law, 1977, s.199(c).

[12] Ibid. s.1(a)(2).

[13] Ibid. s.1(b).

[14] Ibid. s.2.

[15] Ibid. s.6.

by the nature of the offender, but by the nature of the act, a sexual contact made for payment.[16] This interpretation has had the effect of extending the offence even further.

The parallel provision of the CCO[17], had not only been less punitive, but narrower. It applied to males only, the female version requiring some sort of control[18], as required in the third alternative of the presumption of living on the earnings of a prostitute, and did not include any of the other modifications. The Ordinance did not criminalise receiving something that had been given for an act of prostitution, which could apply to almost anything given by the prostitute (or by somebody else), requiring only knowledge.

The provision has arguably stretched the offence far beyond "living on the earnings of a prostitute". Indeed, the (unofficial) title of the section reads "Procuration"[19] , a wide definition, possibly applicable to providers of services, who might not even charge exorbitant prices, had it been done "knowingly". Reservations are similar to those expressed concerning restrictions of the prostitute's ability to lead a normal life and to develop connections and relationships just as any other human being, without risking prosecution. The only plausible impetus for this broad legislation appears to be in the often described, regarding England, "moral panics". This view is supported by some of the manifestations of repugnance and fear, evoked during the Knesset debates, notably MK Nir's analogy between instigation to prostitution and murder[20], and generalisations such as "we know which class those people belong to...they send girls to clubs abroad..."[21]. The only seemingly sensible MK argued that "hysteria does not bring good laws"[22] , a warning that was overlooked in most discussed legislative processes.

Comparing this provision to the English s.30 and 31 of the SOA 1956, identical to the CCO's provisions except for the punishment, these were much narrower than the Israeli law, yet attracted wide disapproval for permitting too broad an intervention. The questionable criminalisation of potentially harmless partners and services' providers has been debated ever since the Wolfenden Report.[23] As seen, a comprehensive discussion was conducted by the 1980s CLRC, particularly in the 1985 Report.[24] While the Committee still refused to base a new set of offences wholly on the elements of coercion and exploitation (which would have undeniably justified it), its proposals, which have not been adopted, still presented a possibility

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[16] Cr.A. 236/65, *El-Bana v. The Legal Advisor*, 19(II) PD 463.

[17] CCO 1936, s.166(1).

[18] Ibid. s.173.

[19] The official translation into English has been used regarding the 1962 Law.

[20] D.K.1962, p. 1925.

[21] Ibid.

[22] D.K.1962, p. 1927. per Meridor,E.

[23] Wolfenden Report, para.302.

[24] CLRC, 1985 Report.

for a more appropriate law in this area. The recommendations seem even more reasonable compared to this all-embracing Israeli provision.

This attitude should be remembered when the evergrowing problem of organised prostitution and exploitation is considered, the problem which would be the impetus for recent legislative developments. Had the law been better equipped to encounter specific situations involving control and exploitation, the problem may have not reached its current devastating extent. While fears about increased commercialisation were unrealised in England[25], the wide criminalisation has not deterred the apparently growing commercial exploitation in Israel[26].

The only ostensible advantage of the 1962 Law is its general, gender-neutral application,while in English law different provisions apply[27] . However, the prostitute can only be a female.

As the Law has not been amended, this still is the situation, and the criticism makes the abundant proposals all the more understandable.

<u>"A man who lives with..."</u>

The element of "to live with" has been broadly interpreted. The courts were apparently ready to include most forms of relationships, holding that "the words...have a meaning that stresses the relationship and the association more than the physical place of residence".[28] The man could have other accommodation besides the place he shared with the prostitute[29], he could spent most of his time working elsewhere[30] , and he would still have to rebut the presumption and prove that he did not live on her earnings.

Judicial interpretation thus served the legislator's purpose. With the notable exceptions of the required knowledge and the available penalties, the words of the law have been widely interpreted to cover a variety of cases, a lot of which would have probably excluded had the law been based on the harmful elements of coercion or exploitation, or even on those used by the 1980s' CLRC: exercising control, organising prostitution or facilitating a contract. The relevant argument regarding the prostitute's forgotten human needs has been exhausted previously.

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[25] Rose,G. (1970) , at p. 353.

[26] And see discussion of the questionable deterrent power of sentencing.

[27] A change along this line was suggested by the CLRC 1982 Working Paper, para.2.6.

[28] Cr.A. 238/66, *Farag v. State of Israel*, 5(IV) PD 485

[29] Ibid.

[30] Cr.A. 400/73, *Giat v. State of Israel*, 28(I) PD 608.

Living on the earnings of a prostitute - 1992 Bill proposals

(revision of S.199 of the Penal Code, 1977)

The 1992 Bill provides that it is an offence knowingly to receive something that has been given for an act of prostitution, whether the receiver is the ponce of the person who practises prostitution, or his supervisor or an accomplice in another way[31] . The provision in S.199(c), regarding the immateriality of the nature of payment, or of the person who gives it (the prostitute or someone else) will remain. The penalty is five years imprisonment.

This provision intended to solve the problem presented by the formulation of "a person who receives"[32], which may include providers of services, by limiting the liability to those who are more directly connected to the act of prostitution, the middlemen. Although the provision has not apparently caused any practical problems, the theoretical drawbacks of having unjustified legal provisions, especially severe criminal ones, positively support the introduction of such modifications.

Compared to the Penal Law, where the maximum penalty has been five years imprisonment, more under aggravating circumstances[33] , regardless of the relationship between prostitute and ponce, the Bill recognises a possibly harmless ponce, the prostitute's partner, following the majority opinion of the Ben-Ito Committee[34] . Thus, it provides that the maximum penalty for living on the earnings, wholly or in part, of a person who practises prostitution who lives with the accused will be three years imprisonment[35] .

However, lowering the term from five to three years imprisonment is hardly significant. It indicates a greater leniency, and it certainly is a step towards justice, yet it is a very severe penalty. If the prostitute is to be treated as a capable human being, policy makers should have been braver. The minority of the Ben-Ito Committee[36], who supported a more radical formulation, considered that denying the prostitute her right to live with a companion could not be justified. It was equal to punishing an innocent person, whose loneliness with its disastrous emotional results was recognised by the Committee itself. Furthermore, the punishment is continual, as the prosecuted man would have to decide whether to leave or to risk another prosecution, probably less leniently punished, presenting opportunities for blackmail. While a distinction between the procurer and the person who merely lived on the earnings may be

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[31] 1992 Bill, s. 2(1)(a).

[32] Penal Law, 1977 , s.199(2): "A person who knowingly receives..."

[33] Ibid., s.199.

[34] Explanations, op.cit. p.930.

[35] 1992 Bill, s.2(1)(b).

[36] The Ben-Ito Report, at p.89. Dr L.Shelef and Dr M. Horowitz

difficult to prove, such difficulties have been common to most sex offences. Moreover, the suggested wide definition of "prostitution" would deny this right from a whole new range of people: male prostitutes, women working in massage parlours. On the whole, then, a fundamental distinction would not have been out of line with the rest of the Committee's recommendations. Furthermore, the retained term of imprisonment when the offence is committed under aggravating circumstances[37] would have probably been lowered had the punishment for 'regular' poncing been more lenient. While those circumstances may indeed justify a harsher sentence, this extremely long term (7 years) should arguably be reduced.

Nevertheless, the practical, political, chances of the Bill would have been diminished had the proposal been radical.

Similar considerations were reviewed extensively regarding the English law. However, the 1980s CLRC's final recommendation for a new body of offences is very different from this Bill, as both the Policy Advisory Committee and the CLRC did not regard living on the earnings of a prostitute as necessarily justifying intervention[38] , when a less invasive formulation could sufficiently cover undesirable coercion and exploitation.

The CLRC rightly recognised that the criminal law failed to identify what ought to have been its main thrust, the prohibition of the organisation of prostitution[39]. Unfortunately, this criticism, just as accurate regarding the current Israeli law, will still be relevant if the law is amended according to the 1992 Bill . A change is undoubtedly needed, considering not only the law's flaws but also the main incentive for this Bill, the ever expanding organised prostitution, often linked with other criminal activities. However, the suggestions appear too minor and timid to change significantly the condition of prostitutes, and, on the other hand, they have not included a new strategy to confront successfully the allied undesirable elements. A change similar to the CLRC's proposals, creating the offences of exercising control or direction over a prostitute or organising prostitution [40], and assisting a person, for gain, to meet a prostitute for the purpose of prostitution [41], would introduce a better defined, more precise formulation. Although it could still be criticised for not emphasising coercion and exploitation, it would shift the balance in this direction. As argued, it was probably considered that a formulation not very different from the current one would ease passing the Bill. However, replacing a faulty law by a slightly improved one does not seem to be a desirable legislative method.

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[37] As in the Penal Law, 1977, according to S.2(1)(c). Aggravating circumstances :when the prostitute is under 18 years, or when special relationship exists. Imprisonment will be seven years.

[38] CLRC 1985 Report, para.2.27.

[39] Ibid.para.2.7.

[40] CLRC 1982 Working Paper, para. 2.7-2.8.

[41] CLRC 1985 Report, para 2.18.

The minority of the Ben-Ito Committee commented that society was not keen to let prostitutes lead family life parallel to relations with their customers[42], claiming that a consistent application of this norm would mean forbidding married men to see prostitutes. Although not drawing the broader conclusion, the inconsistency with the Committee's favourable reference to the Wolfenden philosophy, this remark captured the double standard that has been embodied in the law. Not only that nobody would consider imposing any such restriction on married men, but the Israeli law so far has been reluctant even to impose liability on customers who evidently caused as much harm and nuisance as prostitutes. The similarity to the current English law (unsuccessfully enforced) is apparent. All the surrounding factors have been recognised, society's reaction, the prostitute's loneliness and social isolation, the impossibility of abolishing prostitution and hence the need to let it be practised with the minimum of harm done, yet the criminal law intervention is far wider than necessary, directed at the weak and the vulnerable, discriminating in favour of the "respectable".

"A Prostitute"

By 1962, the term "common prostitute" was still used in England[43], although criticised. A prostitute had been defined in endorsed precedents as "a woman offering her body commonly for lewdness for payment in return" [44]. The "offering" element was broadly interpreted, as including both a passive and an active involvement of the woman, thus widening the meaning of `prostitution'.[45]

In Israel, a similar expansion of the term has evolved. As this definition is repeated in variations throughout the law, its determined scope may well determine the actual use of the law.

The term "prostitute" was initially interpreted according to its usual, traditional meaning similar to the English one, requiring sexual intercourse.[46] However, it was widened to include any "use of the woman's body, for payment, in order to satisfy sexual desire".[47] The 1992 Bill followed this trend, introducing a definition of "An act of prostitution"- physical contact between two or more, including a contact using accessories, in order to cause sexual satisfaction, in exchange for payment."[48]

Furthermore, the Bill extends the scope by changing "a prostitute" to "a person practising

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[42] The Ben-Ito Report, at p.89.

[43] SOA1959 , S.1(1).

[44] *R. v. De Munck* [1918] op.cit.

[45] *R. v. Webb* (1963) op.cit, regarding S.22 and 30 of SOA1956 .

[46] Cr.A. 236/65, *El-Bana v. The Legal Advisor*,19(II) PD 462.

[47] Cr.A. 531/75, *Avital v. state of Israel*, 30(II) PD 579.

[48] 1992 Bill, s.1. Following ch.12 of the Ben-Ito Report, p.55-56.

prostitution", a person who offers his services to the public for the act of prostitution. Since the word "prostitute", in Hebrew, is feminine, an explicit inclusion of males was required, and a specific provision would revise the 1977 law, changing "a woman" into "a person". It appears to be a compromise between the current formulation and English suggestions mentioned earlier, to include "any person", a proposal deemed to wide and too risky.

The judicial decision was targeted at the expanding problem of massage parlours, whose owners, according to the earlier interpretation, could not be convicted for living on the earnings of a prostitute, since the meaning of a "prostitute" was not wide enough to include certain acts[49]. The courts held that a physical contact was required[50], but that was the only restriction, quoting the decisions in *De Munck* and *Webb* [51] and following them. The reasoning was the supposed intention of the law to protect the woman from exploitation in the sex industry. As in England, the judges assumed their protective role without questioning it, without inquiring whether there was a real exploitation or just an exercise of an adult woman's free will. "Protection" has clearly been the ultimate justification, after which there is no dispute.

One decision highlights the ludicrousness of the 'protection' claim.While "a prostitute" has always been understood as "a female prostitute", the offender could of either gender. In *Lavan* [52] a woman was convicted of maintenance of a place for the purposes of prostitution[53] , according to the same rationale, although only she was working there. Was she protected from her own exploitation? Had the Law not abolished the English definition of "a brothel" as requiring the use of at least two women, this woman would not have been convicted. It evidently is a prime example of criminalising prostitution per se, by denying the woman a place to work and by widening the scope of liability to cover any variation. The overall impression is, then, that the courts followed the legislator's contempt of prostitution, going even further in widening the offences by way of interpretation.

Presumption of living on the earnings of a prostitute

The law provides the refutable presumption that a man who lives wholly or is habitually and permanently in the company of a prostitute, or uses his control or influence over a prostitute in a manner likely to aid or compel her prostitution, shall be presumed to live on her earnings[54] .

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[49] Kedmi, Y. (1989)vol.3, p. 1147. As a District Court judge, his book has served as a source for judicial insights as well as practical guidance of the criminal law.

[50] In Cr.A. 531/75 *Avital* .

[51] Ibid. p.579,580.

[52] Cr.A. 538/75 , Lavan v. State of Israel, 30(II) PD 583.

[53] Penal Law Amendment (Prostitution Offences) Law, 1962, s.5.

[54] Ibid., s.1(c). Penal Law, 1977,s.200.

The Supreme Court held that cohabitation was sufficient to establish the presumption, rejecting the argument that the words "in a manner likely to aid or compel her prostitution" apply to all three alternatives, and not only to "uses his control or influence".[55] A later similar attempt, regarding the identical presumption adopted in the 1977 Penal Law, was similarly rejected.[56]

Justice Eilon, an orthodox religious judge, recognised the problematic nature of the presumption when it shifted the onus of proof in a situation where the accused and the prostitute lived together as any other partners, where no exploitation was involved. In the specific case, the accused had evidently tried repeatedly to dissuade the woman from practising prostitution. However, following the wide legal formulation, Alon was forced to join the other judges in sustaining the conviction[57], exemplifying the practical implication of the frequent criticisms.

In the original CCO provision, the same three situations raised the presumption[58] . The only difference was the requirement of "habitually and *permanently*" in the Penal Law Amendment, while the British legislator had been satisfied with "habitually". Hence, compared to the previous legislation, the Israeli amendments widened the scope of liability and raised the penalties without making it any more difficult for the prosecution to prove.

A somewhat more balanced situation has been created by requiring actual knowledge, judicially introduced although the presumption did not express the element of "knowing that the woman is a prostitute". However, proving wilfully abstaining from knowing was deemed equivalent to proving actual knowledge.[59]

Concerning living on the earnings of a prostitute[60] , there has been a general agreement that some mens rea is required, although it was debated whether it should be actual knowledge, as regarding the presumption, or whether negligence would suffice.[61] Thus, according to critiques who proposed to base the law on coercion and exploitation, mere knowledge would probably be insufficient, a positive action should have been required. Since an explicit requirement of any degree of knowledge has not been included in the law, the courts' rulings have been necessary to prevent injustice. As the immense importance of presumptions as expressions of policy has been recognised, it may be compared to another presumption of the 1962 Law, regarding the age of the victim[62] , where knowledge was made expressly and conclusively immaterial. While

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[55] Cr.A. 345/76, *Karuzi v. State of Israel*, 31(I) PD127

[56] Cr.A. 132/81 *Rotem v. State of Israel*, 36(I) PD134, 136.

[57] Ibid. p.137.

[58] CCO 1936, s.166(2).

[59] Cr.A.345/76, *Karuzi v. State of Israel*, 31(I) PD 127,129.

[60] S.1 (a)(1) of the 1962 Law.

[61] Kedmi (1989) , p.1149

[62] S.4 of the 1962 Law, discussed below.

the effect of this latter presumption is to aggravate the penalty, the presumption of living on the earnings of a prostitute would determined liability, and it is quite inconceivable that even an extremist legislator would have meant to convict a person for a fact unknown to him.

Presumption of procuration - The 1992 Bill proposal

The Bill revised the discussed presumption, following the distinction between a ponce who does not live with the prostitute and a partner[63] . The offender is consequently "a person", not "a man", the presumed act is receiving the payment knowingly (not living on the earnings of a prostitute), and the facts establishing the presumption would only include an act of using control or influence over another person in a manner likely to aid or compel him to an act of prostitution, not living together or consorting. This revision would be significant not only regarding the offence of poncing, where the knowledge element would be easy to prove, but it would be harder to prove the retained offence of living on the earning of prostitution in ss.(b). This will hopefully affect the number of prosecuted cases in which a partner lives on earnings of a prostitute without involvement in her trade, if the prosecution is deterred by the shifted onus of proof. The revised presumption regarding living on the earnings of a prostitute would have, then, greater influence than could be assumed by the retention of the provision itself. Furthermore, it makes the provision of s.2(1)(b)[64] appear even more unnecessary, justified as a token for those who would have opposed the Bill otherwise.

Instigation of a woman to an act of prostitution

S.2 of the 1962 Law, S.201 of the 1977 Penal Law, 1992 Bill

The law provided the offences of instigation to an act of prostitution with another person, procuration for an act of prostitution using unlawful means[65], and detention of a woman in a brothel against her will in order to procure for an act of prostitution. The maximum penalty is five years imprisonment, seven years under specific aggravating circumstances[66] . The 1992 Bill revised s.201(c), but set similar aggravating circumstances (a person under 18, special relationship, an armed offender) and maintained the maximum penalties.

The courts held that the act of procuration itself was not sufficient to constitute the offence, and

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[63] 1992 Bill, s.3.

[64] Lliving on the earnings, wholly or in part, of a person who practises prostitution who lives with the accused.

[65] Coercion, narcotics etc.

[66] In 1973, carrying a weapon has been added to the list.

the act of prostitution should have occurred.[67] However, should the act not occur, the attempt would still be punishable according to the general principles of the criminal law. Justice Kister reached this decision through reference to S.22 of the SOA 1956, where "attempts to procure" had been omitted from the law, but according to the table of penalties were punishable with two years imprisonment.[68] The reasoning, again, was the legislative aim to aggravate the situation concerning those who exploit and procure.

Of special interest is Kister's remark that prostitution per se not being a criminal offence held little importance, since the legislators had usually separated the act of prostitution to components such as solicitation and poncing.[69] This crude attitude, disregarding its implications, admitting the usually camouflaged nature of the law, supports the frequent argument, that criminalising allied offences incessantly would mean criminalising prostitution.

Regarding procuration using unlawful means, though, the law provides that it shall be immaterial whether the act of prostitution has been committed[70] . The difference would have a significant effect, since, according the Penal Law, the general maximum punishment for attempts is half the punishment prescribed for the offence[71] . The provision exemplifies the degree of severity attributed to this offence, by willingly imposing the full imprisonment term on what could be reasonably considered an attempted offence. Concerning the offence itself, since the woman's autonomy is denied by the unlawful means, it would have been justifiable by utilitarian theories as well as those perceiving the legislator as keeper of morality.

A similar stance is found in the 1992 Bill[72] , which provides that it is immaterial whether the act of prostitution occurred as a result of the instigation or not, relating to the revised S.201(a)(1)[73] and S.201(a)(2)[74]. Under the 1962 and the 1977 statutes, the provision concerning the sentence applied only to the offence of instigation under aggravating circumstances. As the courts held that the act of procuration itself was not sufficient to constitute the offence[75] , the Bill has gone even further than the 1962 Law in criminalising an attempt as a completed offence. Disapproval

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[67] Cr.A. 548/73 *State of Israel v. Dabush*, 28(II) PD 678.

[68] Ibid. p.683

[69] Ibid.

[70] Penal Amendment Law, 1962, s. 2(b).

[71] Penal Law, 1977, S.32.

[72] In the revised s.S.201(b) according to S 4 of the Bill.

[73] Provides the offence of instigation of a person to practise prostitution or instigation for an act of prostitution (again, "a person" instead of "a woman").

[74] The offences of an act done, or instigation of another person to do something, with the intention of influencing another person to practice prostitution or to an act of prostitution. As the former provision specified certain types of acts (coercion, intoxication etc.) and did not include the possibility of yet another middleman between the procurer and the prostitute, this offence is wider.

[75] Cr.A. 548/73 *State of Israel v. Dabush*, 28(II) PD 678.

of the Bill as too lenient and permissive seems absurd considering such extreme measures.

In 1980 the law was amended, adding the offence of detention of a minor under the age of 18 in a brothel or in another place in order to instigate her to prostitution.[76] This provision does not raise qualms, as long as protection of minors is accepted. The less justifiable cases concern procuration of consenting adult women, which, as argued regarding the 1980's CLRC, have evoked questions of paternalism and victimless crimes, or the intervention of criminal law with private morality. Even if the law should not encourage prostitution, as held by the CLRC, it is doubtful whether it should so vehemently discourage it using criminal measures, undeniably the most extreme means available for the state. Both the Israeli and the English laws have been similar in their perception of the criminal law's role regarding procuration, an attitude that has reflected the greatest degree of contempt (and even fear) by using arguably unjustifiable means.

Instigation of a woman to carry on prostitution

S. 3 of the 1962 Law, S.202 of the 1977 Penal Law.

The law made it an offence for a person to instigate a woman to leave her place of residence in order to cause her to practice prostitution, punishable with five years imprisonment, seven under aggravating circumstances, or to instigate a woman to leave Israel with the same intention, punishable with seven years imprisonment. In the 1992 Bill the draftsman united the offences of instigation to an act of prostitution and instigation to practise prostitution[77], a reasonable and welcomed unification of offences.

The difference between "to practise prostitution" and "an act of prostitution" is apparently in the permanent nature of the former, characteristic to employment.[78] As seen, the meaning of "prostitution" has been judicially widened, to include any form of physical contact aimed at satisfying male sexual desire, hence widening the scope of several offences, including this one.

The provision regarding leaving the country, applying, as all the others, to women prostitutes only, reflected views such as that of MK Nir, who claimed that the characteristic ponce was a professional who "sends girls to clubs abroad, to practise prostitution there."[79] The severest penalty prescribed manifested how atrocious it was considered, akin to instigation of a minor.

This traffic element reminds of the "moral panic" that preceded the appointment of the Wolfenden Committee, which had been partly based on fears about immigration, concerning

[76] Penal Law (Amendment no 12) 1980, s.5.

[77] In the revised s.s.201(a)(1) according to S 4 of the Bill.

[78] Kedmi, J. (1989, vol.3) , at p.1168.

[79] D.K.1962, p. 1925.

ponces and prostitutes alike[80] . The influence of the "foreign" element will be discussed regarding the 1990's developments, but is nevertheless mentioned to show the continuity of this argument throughout times and countries. It also corresponds with the discussed perception of the offender as a stranger, not one of the 'normal citizens', a concept that has generated his alienation, and criminalising without consideration to many human rights.

Presumed intention

The 1992 Bill has added a refutable presumption of intention[81] . A person who acted in a certain way, or instigated another person to do something as a result of which a person came to practise prostitution or to an act or prostitution, would be presumed to have intended this result.

Both this presumption and the revision of the offence of instigation to practise prostitution, resulted from the adoption of Ben-Ito's recommendations[82]. The motives should therefore be sought in Ben-Ito's Report. The provision would have obviously facilitated further convictions. While the causal connection may be difficult to prove, it would have been much more difficult to prove intention, a notoriously complex element. With the growing organised prostitution, this provision, along with those regarding procuration, would have probably become prominent. Consideration of this presumption, then, strengthens the conclusion that media's presentation of the Bill as "permissive" has been unjustified.

Presumption of knowledge

S.4 of the 1962 Law, S.204 of the 1977 Penal Law.

For the purpose of the Law[83], it shall be immaterial whether or not the offender knew that the woman was under 18 years of age. A general provision to the same effect had appeared in the CCO[84]. Penalty for the parallel Ordinance provisions (procuration of a female under twenty to have unlawful intercourse with a third party[85], procuration of a person under sixteen to commit sodomy[86]) did not exceed three years imprisonment, procuration offences being misdemeanours. Similarly, the more lenient maximum penalty for procuration in the SOA 1956 is two years imprisonment, except when the girl is under sixteen.[87] According to the Penal

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[80] Newburn (1992) at p.51.

[81] 1992 Bill, s.5, revising s.202, which has been included by the Bill in S.201

[82] Explanations of the Bill, p.930.

[83] Penal Law Amendment, 1962, s.4.

[84] CCO 1936, s.178.

[85] Ibid. s.161(a).

[86] Ibid. s.161(d).

[87] SOA 1956, s.3,4,21,22,23,27 and 29.

Amendment Law, however, the age of the victim may significantly increase the penalty from five to seven years imprisonment.

Hence, it would have been reasonable to expect that the 1962 Law would not follow the Ordinance in this point, particularly considering that a conviction would have been possible anyway, as while the age of the victim constituted an element of the offences in the Ordinance, in the 1962 law the offence would have been committed regardless of the victim's age, serving only as an aggravating circumstance affecting penalty. However, as offenders' rights have obviously been the last priority on the legislator's agenda throughout this law, this is another arguable example of ignoring them, weighting only the ostensible protection of the young.

As regarding other presumptions, practical implication would have been considerable. Easing the burden of proof, or toughening it, by adding or abolishing elements of the offences, has always been a preferred strategy to manifest public policy, as seen during discussions of English attitudes to the elements of annoyance and nuisance, for example. Presumptions are an extreme form, shifting the onus. There must have therefore been sound reasons to introduce yet another presumption. It may be regarded as another symptom of the deep (perhaps exaggerated) concern for the morality of young women, disregarding the lessening offender's rights. The mentioned English view that "the law has always regarded procuration as a particularly vicious crime"[88] , has been shared by the Israeli law, and the moral consensus that the behaviour should be criminalised have clearly prevailed in both countries. The 1982 Committee remarked that " the law should not encourage the recruitment of women into prostitution"[89] , an understatement of the active discouragement that has been pursued by the English and the Israeli laws alike. Criticism has been, however, expressed here about justification of the extent of legal reflection of social condemnation, even regarding youth[90] , when harm has not been done.

Premises used for prostitution

S. 5,6 of the 1962 Law, S.204, 205 of the 1977 Penal Law.

Although the CCO provided a similar offence to those of s. 5 (maintaining or operating a place for the practice of prostitution [91]) and s.6 (letting a place knowing that it will be used by a

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[88] Hall,J.G. (1958), at p.176

[89] CLRC 1982 Working Paper, para.5.7.

[90] Though not, conceivably, minors.

[91] CCO 1936, s. 163. The penalty: five years imprisonment.

woman for the purpose of prostitution[92]), the difference is significant. While the Ordinance applied to "a brothel" that required the use of two females or more, the Penal Law Amendment applies to any premises. Thus, the use by a single prostitute is enough to convict the landlord or even the prostitute herself. The law, although not criminalising prostitution per se, is making it quite impossible to practice, and may even prevent the prostitute from leading a normal life and renting a flat. While the aim of s.6 was only to "deny the woman of acquiring a place that may be used by her for the purposes of prostitution"[93] , the effect would be harsher if she may reasonably fear that a landlord would reveal her profession and evict her, not wanting to risk prosecution. Additionally, it exposes her to exploitation by paying exorbitant rent.

The law went even further by defining a "place" as including a vehicle and a vessel[94] . Whereas this definition had a general application in the 1962 Law, the Penal Law incorporated the term specifically in S.204 and 205, as if to emphasise the wide scope, a situation that the 1992 Bill would try to rectify.

Of all the provisions that have been reviewed so far, this seems to have most significantly departed from the Ordinance[95] and the English law, with its central notion of "a brothel"[96]. Hence, interpretation could not rely on English concepts.

A greater similarity is observed between the 1962 Law and the 1980's CLRC's suggestion, comprised of three specific offences of managing, letting or permitting the use of premises for the purpose of prostitution[97] , following the alleged unsuitability of "a brothel". In this respect, the Israeli Law could be assessed as better suited to confront "modern" establishments including saunas, massage parlours and escort agencies, which have posed an obstacle when judged according to the "brothel" concept, especially as the CLRC's proposals have not been legislated, maintaining the apparently inadequate provisions. However, the penalties vary enormously, as the CLRC Report suggested a maximum penalty of 6 months' imprisonment, or a high fine, the two years term suggested in the Working Paper being deemed too severe[98]. By comparison, the Israeli penalties seem exaggerated, vindictive.

The Israeli courts determined two important points. Firstly, it was held that the place may be

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[92] The penalty: imprisonment for six months. The provision applies to a lessor, too, giving him the right to terminate the lease and to sue for eviction.

[93] Cr.A. 361/63, Balgali, 18(III) PD66.

[94] Penal Law Amendment, 1962, s.7.

[95] CCO, 1936, s.151,163,164.

[96] SOA 1956, c.33, 34.

[97] CLRC 1982 Working Paper, para. 2.39, CLRC 1985 Report, para. 3.13.

[98] CLRC 1985 Report, para. 3.17.

used for other purposes besides prostitution.[99] Secondly, the prostitute herself could be charged with maintaining or operating the place for the purpose of the law.[100] However, where a place had been used both for purposes of prostitution and for the woman's accommodation, the judges differed. Justice Zusman held that the combination of two purposes could not possibly result in criminalising the maintenance of a place used as accommodation.[101] The minority opinion of Justice Landoi in another case supported this attitude.[102] Nevertheless, the decision, ultimately given by five justices, held that maintaining a place for the purpose of prostitution would indeed constitute an offence even if the place was simultaneously used for her accommodation[103] . The decision has been followed as binding.[104]

In English law, by comparison, it has been established that the prostitute herself could not be charged with this offence, and the Wolfenden Committee acknowledged the need to distinguish between "a brothel" and "premises used for the purposes of habitual prostitution", allowing the prostitute to practice her trade while causing the minimum nuisance.[105] 1980s' proposals to criminalise prostitutes working in brothels[106] were rejected, as, presumably, such convictions would not have contributed to closing the establishments.[107] Furthermore, the 1980's CLRC considered an amendment that the offences would not apply regarding premises used for prostitution by not more than two prostitutes having their home there,[108] and although the Report recoiled from this recommendation[109], it nevertheless showed a degree of awareness that would have made charging the prostitute quite unthinkable.

The Israeli courts had the opportunity to allow the prostitute some dignity, by following Wolfenden's logic despite the different legal formulation, but have decided against it. The result of the severe punishment applicable for this offence, compared to the minor penalties available for solicitation, would have been to drive prostitution onto public places, where it would have been a greater nuisance. The judicial decision was undesirable not only on humanitarian grounds, then, but also on practical public order ones.

Another aspect of the severity with which the courts, following the legislator, have regarded

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[99] Cr. A. 268/63, *Finkelstein*, 17 PD2102.

[100] Cr.A. 361/63, *Balgali*, 18 (III) PD, 66.

[101] Ibid.

[102] Cr.A. 135/64, *Meir*, 18(IV) PD 516.

[103] Cr.A. 94/65, *Turgeman v. The Legal Adviser*, 19(III) PD57.

[104] Cr.A. 538/75, *Lavan v. State of Israel*, 30(II) PD 583.

[105] As discussed earlier in relation to para.318 of the Wolfenden Report.

[106] e.g. Petty, R.N. , (1982).

[107] CLRC 1982 Working Paper, para. 2.36.CLRC 1985 Report, para. 3.12.

[108] CLRC 1982 Working Paper, para. 2.33.

[109] CLRC 1985 Report, para 3.4. See earlierdiscussion of responses and motives.

those offences, concerns sentencing. Before legislation of the Penal Amendment Law, as said, the CCO had not criminalised all the forms of conduct, thus the 1962 offence differed slightly from the previous one. In a borderline case, tried a short time after the 1962 Law had been legislated, the application of the principle of *Nullum crimen sine lege*, may have reasonably determined a more lenient sentence.[110] However, the court imposed a severe punishment of three years imprisonment, two of them conditional[111] , actual imprisonment reduced on appeal to six months. Even considering the appellant's previous convictions, all concerning soliciting for the purpose of prostitution[112], incarceration for a term of several months as a result of a new offence, with a long conditional imprisonment that would probably be operated, still seems like a debatable penalty. By comparison, a six months imprisonment is the penalty that would have been applicable according to the SOA 1956, or the Ordinance, only for a second or a subsequent offence, a term considered long enough to deter recurrent offenders. The predictable outcome of this sentencing policy would have been to drive prostitutes to the streets, where they would not have risked more than six months imprisonment.

Maintaining a place for prostitution - The 1992 Bill proposal

The offence of maintaining a place for prostitution would not have been repealed by the Bill, but meaningful changes have been recommended. The revised S.204 of the 1977 law[113] still provides in ss.(a) the offence of maintaining or operating a place for the practice of prostitution, retaining the severe maximum penalty. Significantly, however, ss.(b) provides that for the purposes of ss.(a) and s.205 "a place" shall not include:

(1) a separate "accommodation unit", whether it is used for this purpose alone or also as a place of residence, providing it is used for the pursuit of the occupant only, and not for the practice of prostitution by any other person as long as possession has not been changed.

(2) A hotel room, even if let knowingly for the purpose of an act of prostitution, providing payment for the room is not calculated according to the payment for the act of prostitution.

(3) A vehicle or a vessel.

This provision have apparently misled the public and some members of the Knesset to believe

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[110] For a discussion of the principle of legality and its Israeli application see: Levy,Y. & Lederman,E. (1981)p. 62,87. In p.96 the authors refer to the arguments regarding application of the principle to judicial interpretaion, noting that inovative interpretation broadens the limits of responsibility just as much as retroactive legislation (certainly undesirable) would.

[111] "A conditional imprisonment" is the Israeli equivalent of the suspended sentence, the term has been preferred here as it is the language of the 1962 and 1977 Laws.

[112] Cr.A.147/63, *Biton v. The Legal Advisor*, 17(II) PD1287.

[113] Revised by S.8 of the 1992 Bill.

that the Bill legalised prostitution. Compared to the English law, however, this proposal is not radical. The provision permitting a single prostitute to practise prostitution in her own place would actually mean returning to the law as it was in the CCO, defining a "brothel" as requiring at least two prostitutes. The Ben-Ito Committee, whose recommendations were adopted in these changes[114], praised the attitude of the Mandatory legislator as ensuring maximum privacy and minimum of public harm, while attributed nuisances may be encountered by civil procedures.[115] This attitude, of resorting to measures other than criminal law, was supported earlier in the context of the English situation.

In England, the CLRC seriously considered 10 years prior to this Bill that the offences should not apply to premises used for prostitution by not more than two prostitutes living there[116]. Even if just the CLRC's proposal to abolish the term "a brothel"[117] had been adopted, the consequent situation would have been similar to that suggested by the Bill, except for the Bill's relaxation concerning hotels.

The Bill may not be as radical as thought, but it is nevertheless necessary, considering the Israeli precedents which have widened the scope of the law to an unreasonable extent. A fundamental similarity between Israeli and English suggestions appears to be in the desperate attempts to get away from the commercialisation of prostitution, realising that it can not be eradicated, and into a presumably more enforceable regulation, which would, hopefully, involve less criminal elements, and would divert the trade from places which have been connected with those criminal elements, particularly massage parlours and escort agencies.

As this change has involved shifting the emphasis from the streets to less visible activities, theoretical justifications, particularly the ostensible distinction between private and public, have had to change accordingly.

One hindrance to the good intentions embodied in this proposal may emanate from the Bill overlooking the offence of letting a place for the purpose of prostitution[118] . As most prostitutes do not probably own premises, the retention of the provision in its current form would deny the proposal much of its contents. Although the Ben-Ito Committee considered exclusion of hotel rooms, which may be controlled by licensing schemes as an appropriate solution[119], success of diverting prostitution to hotels is doubtful.

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[114] The Ben-Ito Report, ch.13.

[115] Ibid. at p.60.

[116] CLRC 1982 Working Paper, op.cit.para. 2.33.

[117] CLRC 1982 Working Paper, para. 2.39, CLRC 1985 Report, para. 3.13.

[118] Penal Law, 1977, s.205.

[119] The Ben-Ito Report, p.61.

Permitting a minor to reside in a brothel - Protection and rehabilitation of minors

Despite the comprehensive legislative intentions, while s.12 of the Penal Law Amendment repealed most of the relevant CCO offences[120], some issues were retained even after 1977, alongside the 1962 Law, predominantly the offence of solicitation[121]. Other maintained offences included procuration to commit sodomy[122], indecent suggestions[123], and allowing a child to reside in a brothel[124], although the definition of a brothel was repealed.

The offence of permitting a minor to reside in a brothel[125], reflected the Ordinance's provision. Two changes were made. The age of the minor was raised from sixteen to seventeen, and the maximum penalty increased from imprisonment for six months or a fine of twenty five pounds to three years imprisonment. This severe penalty is consistent with the punitive, even vindictive, analysed trend towards the allied offences throughout the law. The retention of the term "a brothel", that has not been an integral part of the Israeli law, but a relic of the English tradition, is highly unsatisfactory, and could be meaningless. As seen, in England the term was criticised by the 1980s CLRC as inapt regarding new notions and establishments, amendments have been proposed. Moreover, as it did not appear in other Israeli provisions and was not defined, its retention was breaching rules regarding clarity of the law. It probably indicated a hasty legislative process, despite the seemingly serious intentions. Furthermore, it reconfirms how the assumed protection of youth has acquired an importance greater than that of legal principles. The law could have been used to detach children from their mothers in various unclear cases.

Treatment, rehabilitation and minors - The 1992 Bill proposal

The Bill added a new provision that it is an offence to act maliciously in a way that may obstruct treatment or rehabilitation of a person who practises prostitution[126] . "A person who practices prostitution" defined as including a person who practiced it or who is about to do it. Ever since the Wolfenden Report, and others that supported legal expression of rehabilitative measures[127], there appears to have been a process of disillusionment that led to silence, a general development not restricted to this legal sphere, although it may have been changing again. As

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[120] CCO 1936 s.151,161(a)(b)(c)and(e),162,163,164,166,170,173.

[121] Ibid. s.167.

[122] Ibid., S.161(d).

[123] Ibid., S.168.

[124] Ibid., S.165 .

[125] Penal Law, 1977, s.208.

[126] The 1992,Bill, s.7, adding a new s.203 to the Penal Law,1977.

[127] e.g. Hall, J.G.(1958) .

rehabilitative aims have not been encountered frequently regarding Israel, this provision is somewhat surprising. The Committee on the Status of Women, for instance, acknowledged the negligible chances of rehabilitation in 1978[128], although an isolated example, the recommendation to establish shelters for prostitutes, showed an almost unrealistic degree of hope that was still entertained.

Despite the general definition "a person", the rehabilitation implied in the "treatment" would have mainly concerned minors, as the only other reference to treatment is in s.13, adding to the Youth Law (treatment and supervision)1960 the cases of a minor practising prostitution [129], and the child of a prostitute, who would be deemed "minors in need", of which a welfare officer should be notified. However, it was probably hoped that the abolition of mandatory imprisonment would enable referral of cases to probation, extending rehabilitatation to adults.

The Bill followed the emphasis on rehabilitation efforts targeting minors set by the Ben-Ito Committee, who even endorsed coercion, under certain circumstances.[130] Thus, the Bill[131] revised provisions of the Criminal Procedure Ordinance (Arrest and Search)[New version] 1969 to include a minor who practises prostitution or who is present in a place for the purpose of practising prostitution. Consequently, a policeman may ask the minor to accompany him to a police station and an arrest will be allowed upon refusal, in order to hand the minor to a welfare officer, an authorisation that can not be considered as less than coercive.

Other extreme views have been expressed. The Committee on the Status of Women proposed to increase penalty for procuration of a minor to an unprecedented 15 years imprisonment[132], and elaborated proceedings of treatment, including removing the girl from her family and transfer to an institution or an adoptive family. [133]

The Ministry of Justice is currently reviewing a proposal to criminalise using the services of a prostitute under the age of 18[134] , a further paternalistic step, and, significantly, one of the few examples of customers' liability.

While protection of minors practising prostitution may be a relevant consideration, endorsed ever since the Wolfenden Report [135], referring prostitute's children to social services implies

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[128] Summary of discussions and findings of The Committee on the Status of Women,1978. p.252.

[129] According to S.198a.

[130] The Ben-Ito Report, at p.10.

[131] In S.14, revising s.2 and s.3 of the 1969 Act.

[132] Recommendations of The Committee on the Status of Women,1978, op.cit., s.199, p.107.

[133] Ibid. s.200.

[134] Danos,M.(1996)The current minimum age is 16.

[135] e.g. The Wolfenden Report, para.280, getting a social/medical report.

prejudice. The prostitute had indeed been portrayed as a necessarily unfit mother, using her children to avoid arrests.[136] As claimed regarding Wolfenden's recommendation, these proposals demonstrate the denunciation of prostitution, manifesting a moral posture which could be justified only by paternalism. The maximum penalty attached to the proposed offence of obstructing a treatment, five years imprisonment, shows the attributed severity, besides the extent of hopes for rehabilitation.

The Bill, however, adopting again a recommendation of the Ben-Ito Committee, aimed to abolish the offence of permitting a minor to live in or to frequent a brothel[137] . This abolition, along with the confined definition of "a place", would allow prostitutes to lead a (more) normal life, practice their trade at home, not on the streets, and keep their children without risking prosecution.

The conclusion is that the 1992 Bill was inconsistent in its attitude towards the prostitute as a parent, or, more generally, the prostitute as a person deserving a normal life, while it was very consistent in its aim to divert minors from practising prostitution. The elaborate attention given to several laws that would have to change pursuing this purpose, contrary to vague formulations and inconsistencies in the Bill regarding other matters, appears to reveal a complete disdain towards prostitution. It can not be reasonably regarded as promoting the trade in any way.

The foundation of these provisions, the legal expression of perceptions of family values and shaping the young, not necessarily minors, into the 'appropriate' social mould, will be re-encountered regarding marital rape.

Evidence and a note on feminist approach

S.8 of the 1962 Law, S.206 of the 1977 Penal Law.

As reviewed regarding the English law, obtaining evidence has been a major problem of prostitution offences, often resulting from the special relationship between prostitute and ponce, but also following reluctance of all participants (including neighbours) to be involved with the police and the criminal justice system, or with accompanying criminal elements. Several provisions have purported to provide solutions.

The law[138] enabled the woman to testify against her husband and parents, without being deemed an accomplice. However, her evidence required corroboration. In 1982, corroboration has been

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[136] Recommendations of The Committee on the Status of Women,1978, op.cit. s.201.

[137] S.10 of The Bill, s.208 of the 1977 Law (S.165 of the Criminal Code Ordinance).

[138] S.8 1962 Law ,S.206 1977 Law.

amended into the lesser need to find in the material something to sustain her evidence[139].

The connected offence of instigation not to give evidence[140], punishable by three years imprisonment or five years if using unlawful means, was discarded in the 1977 Law, as a general provision has covered the case.

Far from being merely procedural provisions, these are other examples of legislative strategy aimed at securing convictions. Reducing the requirement of corroboration is the most blatant step, alongside presumptions, in shifting the onus in favour of the prosecution. To some extent, it may be seen as answering the concern that the woman would not be willing to testify against the man. However, as her unwillingness probably stems from reasons other than fear of being prosecuted herself, the provision's effectiveness has been doubtful[141] .

The Knesset justified the lessened requirement of corroboration by the general change of attitude concerning evidence of an accomplice, and the abolition of the corroboration requirement regarding evidence of complainants in sexual offences[142] . Indeed, the prostitute may fall between these two burdened categories. While the change would have made the law more homogeneous, it may be argued that the strictness of the requirement of corroboration served a purpose, and the similarity between prostitution offences and sexual offences or the rules regarding accomplices was not enough to justify its abolition. It is certainly unclear whether the rationale for abolishing the requirement in sexual offences, the private nature of the act that makes other evidence unlikely, has much relevance to these cases, which are not as secretive, and often extend over time, so that evidence may be gathered.

However, a trace of the requirement has remained in the need to find in the material "something else" to sustain it, while it has been abolished regarding the other sexual offences. This probably reflected apprehension of false allegations. The very essence of the offence, the relationship between prostitute and offender, may evoke fears of vindictiveness, especially as the offence of living on the earnings has remained, a suspicion that has similarly been raised in sexual offences where previous relationship existed[143]. Notably, an initial similar formulation regarding sexual offences was ardently attacked as tantamount to retention of the corroboration rule.[144] Presently, the court is only obliged to specify its reasons for relying upon the sole testimony, an element borrowed from the civil law and originated in the judge's warning to the

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[139] Evidence Ordinance Amendment Law (no 6), 1982.

[140] 1962 Law, s.9 .

[141] See Sebba, L.(1983), at p.148.

[142] See the explanatory note to the Bill. 1477 Bills, 399.

[143] See later discussion regarding marital rape.

[144] Sebba, L.(1983) , at p.142. The main opposition came from Dr. N. Shapira-Libai, the Prime Minister's Adviser on the status of Women, whose is discussed separately.

jury in England[145] .

The situation will be reversed if the 1992 Bill is accepted. The revision[146] provides that (1) a person shall be competent to give evidence against his companion (replacing "husband") and his parents, and (2) the person shall not be regarded an accomplice, but his evidence shall require corroboration.

The provision is wider in respect of the people it applies to, offenders and witnesses, but it is stricter in imposing the requirement of corroboration, abandoned since 1982.[147] As regarding the offence encountering premises used for prostitution, the proposal would return the situation to what it had been before legal changes occured. The attempt to increase the burden of proof is desirable in offences which carry such a severe punishment, considering foregoing arguments.

As sexual offences, particularly rape, were the first to attract feminist attention, an analysis of the general legal changes (to which evidential changes were incidental) allows a glimpse into the scarce Israeli feminist legal theory, and may benefit the study of prostitution. According to Leslie Sebba, the coalescing forces which contributed to this change included public pressure for a more efficient law enforcement (the "law and order" notion). The courts' resentment of limiting their discretion contributed[148]. As seen, the general move towards the "crime control" model had indeed been apparent in the 1962 Law, and the evidential angle is one expression of it. As the concern with organised crime, a clear incentive for embracing this approach, has been increasing tremendously, "law and order" would not be easily relinquished.

The last factor mentioned by Sebba was the pressure of the feminist movement, holding that the requirement was unnecessary and had originated in a Mandatory misconstruction of a less strict Common Law rule[149]. Still, most of the sources Sebba quoted were not Israeli, and as the late and slow development of the movement in Israel was already mentioned, its actual influence may be overestimated.

Following the fierce feminist objections to assumptions of false allegations in sexual matters, it may be presumed that the amendment to the 1962 Law would have been welcomed, and that feminists would have urged to abolish the residual requirement, as even the less demanding requirement in sexual offences was criticised[150] . Feminists' silence regarding the amendment of the 1962 Law may signify the secondary place that prostitution occupied on their agenda.

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[145] In the Israeli system there is no jury.

[146] S.206 of the 1977 Law (provisions as to woman) Revised by s.9 of the Bill.

[147] Evidence Ordinance Amendment Law (no 6), 1982. S.3.

[148] Sebba, L.(1983) , at p.136.

[149] Ibid. at p.138.

[150] Ibid. at p.145.

compared with a far greater sympathy to the sexual offence victim, a comparison that will be elaborated. While Sebba recognised the utmost importance of extra-legal measures to change public perceptions regarding the sex offence victim, and the feminist movement has certainly shown a commitment to those targets, nothing seems to have been done in this context.

This whole issue, questions of reliable evidence linked with social perceptions, and feminist critique, will be extensively discussed regarding marital rape.

Mandatory imprisonment and a note on judicial freedom

S.10 of the 1962 Law, S.207 of the 1977 Penal Law.

The most controversial provision of the Law[151] provided that upon conviction of an offence under S.1,2 or 3 of the Law, a penalty of imprisonment shall be imposed, either as the sole penalty or in conjunction with another penalty, excluding conditional imprisonment[152].

The CLJ Committee doubted whether to impose imprisonment solely, and whether that should include conditional imprisonment. Despite including conditional imprisonment in the Bill, the Knesset supported the extreme alternative.

During the Knesset debtes, the Minister of Justice expressed reservations.[153] He evoked the principle that the courts should decide whether to impose imprisonment, conditional imprisonment, probation or fine. The obvious rationale being that as legislators can not foresee every circumstance, it is best left to the court, that can assess the particulars. Therefore, even if imprisonment were desirable in most cases, a total exclusion of other penalties would result in a major deviation from an important rule. Although aware of the strong feelings of contempt against these offences, The Minister rightly thought that they were expressed in the long term of imprisonmnet and did not justify further measures.[154] This disregarded criticism clearly followed general legal principles, including the democratic separation of powers.

MK Nir, who proposed the Bill and the exclusion of conditional imprisonment, expressed the extreme public disdain when he compared the offence of living on the earnings of a prostitute to murder. There has been a mandatory imprisonment penalty regarding murder, and according to

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[151] 1962 Law, s.10.

[152] Ibid.

[153] D.K. (34)1962,p. 1923, in p. 1924, per D.Joseph.

[154] Ibid.

Nir's attitude, apparently widespread, a man who lived on the earnings of a prostitute, when "turning her into a prostitute", murdered her soul.[155] This view not only equates profoundly different offences, some of which justified by legal theory and some not, but it also shows the exceptional moral influence on the legislative process, without pretence of a legal cover. Furthermore, Nir supported his view by the CLJ Committee's mentioned intention to impose even harsher penalties.

Nir argued the unsuitability of conditional imprisonment in the circumstances, on the grounds that "(it) is aimed at the occasional criminals, who may be reformed"[156] while the procurer was an habitual offender. The prostitute was obviously regarded as a passive creature, incapable of a valid consent, and her chances and, more importantly, right, of leading a family life were simply overlooked. More excessive generalisations and prejudices upon which to formulate a law are hardly imaginable. The connection made between prostitution and the soul, suggestive of crime and sin, is particularly surprising from a member of the Knesset belonging to a left-wing non-religious party.

The forgotten legal perspective was introduced into this emotional debate by another member of the CLJ Committee, MK Azania, who maintained the unity of legislation. A law that would exempt conditional imprisonment would seriously threaten the concept of conditional sentences, and would undermine other offences. Where conditional imprisonment would still be available, the offence may consequently be regarded as not serious.[157] The seriousness of the offence does not necessitate the abolition of fundamental criminal law procedures.

Influence of moral views (or "the call of the heart"[158]) on legislation could not be more evident. Regardless of convincing legal arguments against this provision, the majority supported it. The very long term of imprisonment did not satisfy vengeful feelings.

Judicial ways to circumvent this undesirable provision, to avoid the severe terms of imprisonment, were required. Thus, the Supreme Court held that courts could impose a term of probation instead of imprisonment.[159] Justification was found in the silence of the legislator in this point, and the interpretation rule that an implied repeal of an existing law should not be constructed, especially if the provision would benefit the accused. It was held that considering the importance of probation, the legislator would not have meant to abolish it otherwise than explicitly. Furthermore, the court held that although a conditional imprisonment could not be

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[155] Ibid. P.1925.

[156] Ibid.p.1925

[157] Ibid. p.1926

[158] Ibid. per MK Azania.

[159] Cr.A. 69/63, *The Legal Advisor of the Government v. Vagel*, 17(II) PD712.

imposed solely, it could be imposed as additional to an actual imprisonment.[160] This has been endorsed, as the legislator's intention would not allegedly be harmed by imposing this additional imprisonment. [161]

The court thus modified severe provisions by using interpretation. Predictably, judges were not pleased with the Knesset's limitations on their discretion. Although the result of the cases is desirable, it clearly exemplifies the dilemma of construing the legislator's intent, because the discrepancy between an assumed intent based upon legal rules of interpretation, and the intent which could have been concluded from the Knesset Reports, has been vast. While the interpretation rules strive to achieve "a good law" respecting the defendant's rights, it can be quite safely assumed that the actual legislators would not have regarded it as a major consideration in the circumstances.

Furthermore, as the law has not been changed since 1962, despite later developments, the courts have had to continue their quest for more reasonable penalties. Thus, in a recent case, reported in the Israeli press, a woman convicted of instigating prostitution and managing premises used for prostitution was sentenced to a fine of about £400, one year conditional imprisonment and ten minutes imprisonment[162]. Such an absurdity had been anticipated by commentators such as Kedmi, although the extremest sentence he saw would have been one day of actual imprisonment[163] . The Tel-Aviv District Attorney, Mrs. Rosenthal, has appealed against this "ridiculous" sentence, arguing that "the decision causes disrespect of the law"[164] . While ludicrous sentences and the publicity surrounding them would definitely not contribute to a public respect for the law, the question is whether the selective police enforcement, argued by the judge as the reason for not taking the offences seriously, and the judicial criticism, should not lead the legislator to the conclusion that the gap between law and reality, between law as it is and law as it should be, has reached such a magnitude that it requires action, before every legal detail, desirable provisions and undesirable ones alike, suffers from unanimous scorn.

The Supreme Court Justice G. Bach's argument that the prosecution and the police were mainly interested in obtaining severe sentences for those procurers who dominated and often terrorised the prostitutes under their "care"[165] , may support a claim similar to English proposals for a law based on coercion and exploitation, the elements which have arguably been the crux of the

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[160] Ibid.

[161] C.A. 558/62 *Rabu v. The Legal Advisor*, 17(I)PD162.

[162] "The sentence - ten minutes imprisonment", (1995).

[163] Kedmi, Y. (1989 vol.3) , at p.1180.

[164] "The District Attorney defined the sentence "ridiculous" and appealed." (1995).

[165] Bach,G.,(1974), at p.574. Bach was then the State Attorney and later became a Supreme Court Justice.

matter[166] . The formulation of the law, denying the prostitute her right to live with a man, is far wider than the degree of criminalisation thus required, and the damage is worsened by the mandatory imprisonment. Criticisms that were aimed at the English law are obviously relevant here, but have not been made or taken seriously .

Bach acknowledged the contemporary worldwide striving for decriminalisation of certain acts, among them certain sexual aberrations, when practised by consenting adults in private, and the opposite trend of introducing new criminal offences.[167] Although he did not assess the influence of these different views on the Penal Law Amendment, Bach did mention one important and unique feature, the "social and religious spheres, which are in Israel perhaps even more complex than in most other countries".[168] These issues will be closely examined later, although, as suggested, the present discussion certainly examplifies extreme morality, although not necessarily connected to religiousness.

The 1992 Bill would have abolished the mandatory imprisonment[169]. Considering the vast criticism, particularly judicial, directed at this provision, it seems only reasonable and necessary.

It should be noted that the issue of mandatory penalties could have been even more extreme, as MK Nir proposed to exclude bail regarding s.1,2,3, when the offender had similar previous convictions. The reasoning, again, was the seriousness of the offence and the fear of undue influence on the woman, the witness.[170]

MK Meridor answered that this provision may lead to false accusations while the men were still accused, not yet convicted.[171] Even a person who has previous convictions should certainly be heard by court before any steps are taken to minimise his freedom, when there is no immediate threat or special severity. Rejection of this proposal expressed a greater degree of adherence to legal principles (particularly the presumption of innocence) than had been shown regarding mandatory imprisonment.

Judiciary and the legislative authority

The courts strategy, both in widening the law and in determining the penalties, evokes another issue, beyond the specific implications, namely legislative adjudication. The occurrence of alleged legislative adjudication concerning moral issues has been observed frequently, therefore,

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[166] This view was analysed here mainly in relation to the 80's committees.

[167] Ibid. p.570

[168] Ibid.

[169] S.10 of The 1992 Bill abolished S.207 of the 1977 Law (S.10 Of the 1962 Law).

[170] D.K.1962, op.cit.,p.1926

[171] Ibid.p.1926-1927

an acknowledgment is due, although it will be elaborated regarding marital rape. Furthermore, this has probably been the most controversial subject in current Israeli jurisprudence, and its echoes, following particularly innovative cases, have reached the media and the Knesset in an unprecedented way. It may be compared to the debate that followed*Shaw* , but on a seemingly larger scale.

Over ten years ago, Hadassa Ben-Ito remarked that the function of the judge as legislator was one of the fundamental and difficult contentions, ranging between the extremes of strict adherence to the law and the view of the judge as facilitating a better and more just law[172]. The reviewed cases seem to fall into the second category, at least in the eyes of the courts themselves. The greatest supporter of that opinion has been A.Barak, the Supreme Court's Chief Justice, whose ideas, along with those of his opponents, will be inspected later.

While legislative adjudication has stretched court's freedom to its limits, or beyond, the other side of the blurred boundaries between the state's authorities has been exemplified by the severe limitation on the judge's discretion, a consequence of the mandatory imprisonment, where it is the legislative authority that has arguably exceeded its limits. This stance will be repeated regarding sexual offences, where minimum sentences have been suggested (and have apparently been accepted), causing a justified judicial uproar.

The the two foregoing legal phenomena demonstrate the apparent link between heated opinions concerning moral issues, based on significant extra-legal considerations, and consequent breaches of essential legal principles determining the relationship between the state authorities.

Solicitation
The Penal Law, 1977

The Penal Law was intended to be a comprehensive Israeli criminal code that would replace all pertinent previous legislation. A member of the drafting committee, G. Bach, explained that it compared the existing Israeli law with criminal codes of other countries and with "model codes"[173], and considered the applicability to Israel of certain criminological trends, including those urging decriminalisation of certain offences.[174]

However, the legislator of the Penal Law, 1977 adopted the provisions of the 1962 Law in the discussed area[175], as seen through the foregoing joint assessment, except for s.11 and 12.

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[172] Ben-Ito, H. (1984), at p.58.

[173] G.Bach (1974), at p.569.

[174] Ibid.

[175] Under Article Ten: Prostitution and Obscenity, in Ch.8, offences against the Political and Social Order.

referring to the Mandatory law, therefore irrelevant, and s.9 that encountered instigation not to give evidence, covered under obstruction of justice in the 1977 Law.

Additionally, certain CCO provisions have been incorporated, with minor changes, as the Ordinance was to be finally replaced. Solicitation, the most often used offence, will be viewed next.

The Penal Law provides two separate offences, (a) solicitation for immoral purposes of any person in a public place and (b) aiding to solicitation of a minor when a link of supervision exists, the minor being og either gender, following the provisions of the Ordinance, that had not been repealed by the 1962 Law[176] .

The Ordinance's maximum penalty was raised in 1965[177] , from one month imprisonment to three months regarding solicitation, and from six months imprisonment or a fine to three years, regarding aiding solicitation. The 1977 Law merely repeated this change, and increased the age of the child in ss.(b) from sixteen to eighteen, concurring with the age of majority.

The formulation has ostensibly differed from that of the SOA 1959[178], as s.167 had not been directed specifically at prostitution. Furthermore, in the Israeli law, the soliciting person does not have to be "a common prostitute", hence the solicited person may be of either gender. As for penalties, initially, the maximum penalty had been similar, yet in England imprisonment was abolished in 1982 as applicable to women's solicitation.

As seen, an attempt in the Standing Committee, during discussions of the 1959 Bill, to substitute the words "a common prostitute" with "any person" was rejected, for fear of widening the scope to an alarming extent. Other failed attempts, mentioned earlier, have followed. However, in the years that the Israeli law has been using this general formulation, a misuse of the law has never been claimed.

Furthermore, interpretation has seemingly been restricted to prostitution without much consideration to available alternatives. Although the words "for immoral purposes" were construed as "to do a private act bearing a sexual character"[179] , which could be any behaviour denied by sexual morality, not solely prostitution[180], the aim of the general offence has been judicially restricted to "the need to protect the public from solicitation for the purpose of

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[176] Penal Law, 1977, s.209 , solicitation and aid to solicitation, CCO 1936, s.167.

[177] Criminal Code Ordinance Amendment Law (no 29), 1965, s.4(22).

[178] SOA 1959, s.1(1).

[179] Ibid.

[180] Kedmi,J. (1989), p.1183.

prostitution in public places"[181] , thus obstructing a possible legal breakthrough, unintentionally narrowing the gap with the English situation.

"Immoral purposes" have been required in the debated s.32 of the SOA 1956, bearing a severer maximum penalty of two years imprisonment. As reviewed, although the gender of the solicited person was not specified in s.32, and attempts were made to use it regarding kerb-crawlers[182], common agreement seems to have been, despite criticism, that the section should only apply to homosexual solicitation and illegal acts[183] . The term was narrowly construed in the leading case. *Crook v. Edmondson*[184] , the court holding that sexual intercourse between a man and a prostitute could not be included, as the term meant "such immoral purposes as are referred to in this part of the Act of 1956"[185], trading in or exploiting prostitution.

Judicial interpretation has thus had ostensibly opposite effects. In Israel, only prostitution has been included, compared to mainly homosexual soliciting in England. Although the provisions are dissimilar in other respects, the interpretations are akin in serving clear, essentially similar, moral policies. The English court saved the heterosexuals, the customers of prostitutes, from criminalisation, and the Israeli court restricted the liability to prostitutes only. Both laws have been limited to prosecuting those who are regarded as contemptible, outcasts, not "respectable".

Similarly, no evidence could be found that the Israeli provision has ever been used regarding customers, kerb-crawling, although the formulation is wide enough. It would have been wider than the provisions of the SOA 1985, where both offences require solicitation to be made for the purpose of prostitution. The Israeli provision may have even been more equitable, comparable to prostitutes' solicitation, and more enforceable, as the 1985 offences were criticised as potentially more difficult to prove, a woman being more likely to give evidence that she was solicited for sexual purposes than for the purpose of prostitution. Arguments about the purpose element were discussed, as was the failure of the 1985 Law, which could have partially stemmed from this issue. However, as the Israeli Law has not been used this way, the argument is hypothetical.

Although the Ben-Ito Committee commented that both prostitute and customer, in a public place, should be prosecuted[186], acknowledging the nuisance of harassment to women who happened to live or pass through places where prostitutes gathered[187], and despite suggesting

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[181] Cr.A.10/62, *Doik v. State of Israel*, 16 PD782.

[182] e.g. The Wolfenden Committee, para.238.

[183] Renshaw,V. & Goldrein,E. [1959].

[184] Crook v. Edmondson [1966].

[185] Kedmi,J. (1989) , p.836.

[186] The Ben-Ito Report, p.62.

[187] Ibid. at p.64.

that this provision may be used[188], the suggestion appeared to have been made half heartedly, a conclusion that is sustained by its omission from the ensuing Bills.

While nuisances related to prostitution can hardly be disputed, the discriminatory and unsatisfactory formulation of the law can be. The discrepancy in enforcement, as well as in the construction of the law, is made even clearer considering Ben-Ito Report's findings that prostitutes were arrested for 48 hours without being indicted as the police had tried harassment as replacement to a faulty law[189] . The undesirable (and futile) exposure to police whims has often been raised concerning the English law, although there, adversely, it eventually prompted introducing safeguards into the kerb-crawling offence.[190] The practical aspect stresses the importance of enforceability and the results of an inadequate law, and also the problematic relationship between the authorities and the way a public policy may be diverted when its time to enforce the law.

Indecent Suggestions

Although not directly concerned with prostitution, the offence of Indecent suggestions could have affected the situation. The Penal Law followed the CCO[191] .

The courts held that the offence did not require expressed suggestions to act in a certain way, since the purpose was to protect the public from "obscenity and rudeness, even in privacy"[192], not from solicitation for immoral acts.[193] However, this judicial interpretation (in an early case, admittedly) of the aim, without the pretence of the public nuisance which has been the official reason for most solicitation offences, is a dangerous stretching of the scope of the criminal law into new territories. Not only that it would apply to acts done in privacy, but it would protect from "rudeness", a dubious justification for intervention. The category of protected people is another example of the invasion of social perceptions into the law: any person under the age of sixteen or any female. Presumably, the "weak", explained by Ben-Ito Committee's remark as it had been legislated before the rising of "the new women's liberation movements"[194] .

Although it has apparently not been used in cases relevant to this discussion, it could

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[188] Ibid. at p.65.

[189] Ibid. at p.67.

[190] Parl. Deb., Lords, 27.6.1985,vol.465,col.863.per Lord Mishcon, who inserted the term "persistent" at the Committee stage.

[191] Penal Law, 1977, s.210, CCO 1936, s.168.

[192] Cr.A.10/62, *Doik v. State of Israel*, op.cit.

[193] Kedmi,J. (1989) , p.1186

[194] The Ben-Ito Report, at p.65.

theoretically encounter the problem of men accosting women, as the offence of solicitation does not apply. The penalties for both offences are similar, as the Penal Law increased the maximum penalty from one month to three months imprisonment. The result would have then resembled the proposal of the English 70's Working Party , that a desired formulation of the offence should be wide enough to apply to "accosting for sexual purposes"[195], without restricting it to importuning from cars, or to accosting for the purpose of prostitution. That was rejected in England as too wide by the 1980s CLRC and the 1985 Law, and as the presently discussed offence is even wider, it is allegedly even less justified. However, as it exists, it may have been used to rectify the discriminative enforcement of the law.

[195] H.O. (1974) para.268. H.O.(1976) para.97-99.

Israel - Summary and conclusions

The provisions of the 1962 Law were altogether punitive and designed to facilitate convictions rather than consider defendants, a conclusion that accords with Ben-Ito's observation that a law which had been regarded as a reform included harsh restrictions, passed in an incidental way[1], without the Knesset's awareness of their possible outcome[2].

The 1977 Penal Law upheld the tendency towards a broader, more punitive law. Thus, although the higher age limit concerning the young corresponds with provisions of the Legal Capacity and Guardianship Law[3] , the implication is a wider range of cases that could constitute the offences. The increased terms of imprisonment regarding all adopted provisions is meaningful, particularly where the maximum has been increased from few months to three years, namely, aiding a solicitation of a minor, obscene publications, and permitting a minor to reside in a brothel. A clear public policy, if not wholly desirable or justifiable, has been established.

The seriousness with which allied offences have been regarded is evident from every provision, an attitude that has apparently brought unnecessary measures and elements into the legislation. The perception of prostitution too was made quite clear, an utter contempt which has often overlooked "niceties", including humane consideration and legal principles. Failure of this thoughtlessness was predictable.

The comparison to the seemingly different English Law raised certain conclusions. Thus, theoretically, the use of one gender-neutral soliciting provision, wide regarding the purpose of soliciation, was facilitated by the formulation, similarly to proposals that have been raised pertaining the English law and its multiple solicitation offences. The Justice system does not seem to have acknowledged though the possibilities of kerb-crawling or homosexual solicitation. The courts, although often following the punitive direction, have tended towards widening the offences only regarding the "accepted vilains", prostitutes and ponces.

Despite the continuing failure of the law, radical alternatives have been rejected. For example, the then Mayor of Tel-Aviv, having the severest prostitution problem, appoached the Ben-Ito Committee, supporting regulation and ready to allocate an area. The proposal was dismissed, among other arguments, on the ground that even supporters of prostitutes' rights considered regulated brothels a risk to rehabilitation, in perpetuating the negative stigma. Furthermore, social recognition would allegedly facilitate practising for girls, while exploitation would

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[1] Ben-Ito, H. (1984), at p.67.

[2] The Ben-Ito Report, at p.45.

[3] Legal Capacity and Guardianship Law, 1962.

thrive[4]. Although many of the Committee's other considerations have been endorsed, the basic premise for this argument may be challenged, as the Committee obviously considered rehabilitation as the prime goal, not acknowledging that stigma may be only removed by changing social reactions to the trade, not reinforcing its image.

As for the 1992 Bill proposals, repeating the Committee's recommendations, contrary to opinions expressed in the Knesset and the press, the analysis revealed that the Bill would not in any way legalise prostitution. The critics seem to forget that, at least theoretically, prostitution has not been forbidden, a fact that should be reflected in the law. All the 1992 Bill appears to do is attempt to move it from organised trade into private premises. Alongside the provisions that allow prostitutes greater freedom to practise their trade far from public visibility, other provisions would clearly worsen the situation of procurers. The similarity between England and in Israel in terms of the growing concern for commercialised prostitution is remarkable, even if the proposed changes have been different, and each of them seems to have its flaws.

Furthermore, ostensible respect of the Bill for humane conditions for prostitutes would be rather meaningless, considering embodiment of an unacceptable degree of scorn towards prostitution, particularly through provisions regarding minors and the retention of living on the earnings of a prostitute, although another offence could confront accomplices to the actual trade. Had the Bill properly expressed the intentions, the balance between the prostitute's rights and the harm that may be associated with her would have been somewhat rectified. This point is particularly poignant as considerable thought had obviously been put into it, proposing changes to ancillary several laws.

Most of the 1962 Law's criticised provisions, along with the inconsistencies identified in the Bill and the failure to adhere to the Ben-Ito recommendations where no specific formulation had been given, all support Hadassa Ben-Ito's claim that in the modern state most of the legislation is done outside Parliament, and the elected person is not always interested in the exact legislative details[5] . When adding the political pressures on the legislation process, the result of an unsatisfactory law, removed from all the pertinent theories and criticisms, is unsurprising.

Feminism and Religion

Influential factors, in the Knesset and outside it, seem to have been different than in England. While involvement of the feminist movement in this area, at least its political effect, has been minimal, religious opposition has always been strong. One extensive account of the struggle for women's rights against a fierce religious antagonism was given by Shulamit Aloni, a lawyer and

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[4] The Ben-Ito Report, at p.49.

[5] Ben-Ito, H. (1984), at p. 56.

a former leader of left wing parties, who was the chairperson of the committee responsible for modifying corroboration in sexual offences.[6] Aloni detailed the conflict that had started before the establishment of the State of Israel, that had concerned the very basic rights of election and equality. According to Israeli law, every person belongs to a religious congregation, and is subject to its establishment and laws regarding personal status[7] . The implications for women's rights resultant of the necessarly linked notions of modern law with ancient religious concepts, have been innumerable. The dichotomy has rightly been the feature of the Israeli legislation that has attracted most feminist criticism, alongside rape[8] . The basic religious perception of the woman's sole function as "an aid to her husband and a mother to her children" had to be changed first. Therefore, the more controversial issues, including prostitution, had to be discarded in order to acquire power and not to generate disputes while more pressing issues were being resolved. As observed, prostitution has not been undisputed even with the far more established English feminism.

Prostitution and homosexuality were among the offences against morality punished with incarceration by the Jewish law as early as in the sixteenth century[9]. Recent religious attitude has been just as condemning, equating prostitution with sin [10]. The deepest regret for the secular nature of society was expressed, clearly implying a link between secularisation and prostitution. One of the factors that may cause the degradation is, apparently, late marriage[11] . The woman is perceived as a passive creature, easily led astray. Therefore, contending this basic gender perception obviously was a more reasonable commencement for feminist struggles than attacking the attitude towards prostitutes.

Aloni observed that public opinion had been passive, and so had been women's organisations. Hence, a battle for minimal political attainments could have been risked by involvement in moraly-dubious, or at the very least peripheral and problematic, areas such as prostitution. Prioritising was inevitable and realistically anticipated. As seen, even in England, where direct religious influence has been insubstantial, prostitution was not high on the feminist agenda.

However, as interrelations between the gender perception in different areas have been recognised for a long time, pointed out, for example, in England, by MP Livingstone[12], some acknowledgment of the subject could nevertheless be expected. This link was practically

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[6] Aloni,S.(1976) ch.1: "Women's status in Israel: a double morality."

[7] Law of jurisdiction of religious courts (marriages and divorces)1953. Women's equal rights law, 1951, s.5. The legal situation regarding personal status will be fully explained in relation to marital rape.

[8] e.g. Raday,F. (1982).

[9] Eilon,M. (1962) , at p.193.

[10] Dr. Warhaftig,I. (1982).

[11] Ibid.

[12] Sexual Offences Bill, Parl.Deb.,Comm. ,11.5.1990. col.531, 555.

recognised by the Committee on the Status of Women which encountered prostitution as one of the women-related issues. The over-protection offered to women, on par with minors, in the reviewed laws has demonstrated it constantly. The legal system in this sphere has definitely reflected and permitted preservation of social gender relations and not a reform of public opinion. The general omission is therefore quite surprising. Nevertheless, as a transformation of social and psychological perceptions is not made by laws alone[13], perhaps later changes would be effective. Recently, a growing awareness to the legal implications of different trends of feminism seems evident[14] .

A criticism of the last Bill, which passed the first reading in the Knesset in December 1995, by Eilam, a sociologist and one of the few active Israeli feminists, exemplified perceiving prostitution in a broader social way [15], similar to several reviewed earlier English critiques. The Bill will allegedly worsen the situation, placing it in "a social twilight zone", as social and state responsibility will no longer apply. The women will continue to be unable to benefit from basic institutions such as social security, pension, and employment rights, while exploiters will continue to be protected. Eilam suggested decriminalisation to transfer public attention to crimes committed in the process of exploitation. Prostitution, which is taken for granted by society, does not need "regulation", according to Eilam, but recognition as an expression of the woman's position in society, linked with responsibility towards the prostitutes along with a struggle against those factors that allow for prostitution.

On the other hand, religious coercion, especially regarding matrimonial matters, has been continuously discussed but a solution is not presently feasible, since it would necessitate political concessions. The local debate about the borders of law and morality thus has had to consider, besides academic arguments that have been similar to English ones, that in religious law there is no distinction between law and morality.[16] Can the Israeli legal subject truly regard himself as the "modern men, bereft of divinely-ordained truths"[17] ? The recent religious outrage about the development of legislative adjudication, exemplifying how powerful religion still is, and the Supreme Court's opposing independence, will be discussed. However, above all apparently reigns the political ambition, which has kept the academy and even official committees removed from the actual legislation. When asked for his opinion about the chances of the 1992 Bill to pass into law, MK Poras, who had introduced it, answered that if it risked the peace process it would have to be abandoned. Clearly, if the religious parties threaten the government, this issue (although significant in its implications as to the relations between state and religion, or, rather, because of this significance) will be removed from the agenda. Poras's

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[13] Aloni,S. (1976) , at p.25.

[14] e.g. Shachar,A. (1993). and: Fiss,O.M. (1993).

[15] E. Eilam, (1995).

[16] Alback,S. (1980) .

[17] Shaskolsky-Sheleff,L. (1976), at p.192.

initial intention to leave them in a minority[18] has proven to be unrealistic. Already it seems to have disappeared yet again in the CLJ Committee.

Social Changes and Practical Considerations

The ongoing failure of the laws has substantiated Ben-Ito's observation concerning the balance that has to be reached between the law, the judgements and the reality of life, in order to achieve enforceability[19] . Human factors, then, are affective in contrasting ways. While the assumed public morality leads to legal incorporation of provisions that otherwise would not have been justified, human nature leads to unenforceability of the law as it is frequently and blatantly infringed.

Although Ben-Ito directed her criticism at those provisions of the 1962 Law that still apply, nevertheless even legislation along the lines of the Ben-Ito Committee's recommendations, may be obsolete and useless today, due to recent developments, besides lacking justification. For example, would it not be a realistic relaxation to allow two prostitutes to practise their trade in one flat, according to the 1980s CLRC's initial recommendation? The gap between law and reality has never been wider. A law that has been created at a time when the Committee on Women's Status declared that the psychological disposition of prostitutes was defective, is highly irrelevant to an era in which prostitutes are driven by economic difficulties, and other problems, mostly arising from cultural discrepancies of immigration.

A prominent development is the scope of organised prostitution. While in 1976 police records showed a diminishing poncing problem[20], now it presents the biggest threat, and is certainly the most worrying aspect of it. Even if media reports have been exaggerated, research is still required, as the balance of the law would probably have to be shifted. Thus, it was criticised that the latest Bill has ignored the situation maintaining the offences of soliciting, hence exposing the majority of prostitutes (who could not afford separate premises) to exploitation, while neglecting to handle alternative forms of prostitution, including sexual telephone services and parlours, where a huge population of mainly imported females has been exploited, and whose rights (supposedly protected according to international agreements regarding slavery) have been overlooked and violated[21].

The media has certainly centred the apprehension around Russian immigrants and the unprecedented scope of organised crime, including prostitution. It is reminiscnet of the fears of immigration that had prompted the appointment of the Wolfenden Committee, and the

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[18] As cited in: "Coming out of the streets", *Ha'ir*, 27 November, 1992

[19] Ben-Ito, H. (1984), at p.59.

[20] A summary of discussions and findings of The Committee on the Status of Women, 1978. p.252.

[21] E. Eilam, (1995) .

Committee's discussed recommendation regarding aliens, to empower courts to recommend deportation orders[22]. This tendency to blame the alien (as observed in the Knesset debates) may be fuelled by the basic fear of the stranger, which may be exaggerated, along with the actual availability of this practice to people who have to struggle with difficulties of a strange country[23]. Again, the importance of social perceptions (or prejudices) is evident, as are the importance of measures besides criminalisation, and the proper enforcement of existing measure to suppress exploitation.

Ever since the beginning of the 1990s prostitution has been declared "one of the areas of criminal activity in which the Russian organised criminals have specialised"[24]. Critiques that asserted a connection between prostitution and other criminal activities, particularly drugs[25], could not predict such a situation in which murders, blackmail, arson and attacks have all been constituted the struggle for control. Similarly to the English device of marriage of convenience[26], Russians have used false Jewish identities, the only requirement to get an Israeli citizenship[27] , and some have been deported. Naturally, such a sensational phenomenon has received a wide media coverage, supported by the real nuisance caused to many people who have not been helped by the authorities. However, the media has been accused of exaggerating, thus stigmatising the whole immigrant population, manifesting moral panic. Supporters of this latter view would probably also welcome a thorough review of the matter and a more appropriate legal treatment.

Public pressure is, probably, the main impetus for Parliamentary awareness, the importance of pressure groups to the legislation having been stressed before, but despite the media's preoccupation with the subject, no general action has been taken. Yet, one recent local action has been the Amendment to the Law of Licensing Businesses[28] which allows local authorities to license massage parlours without a police consent. Those responsible for licensing in Tel-Aviv municipality declared intentions for "a quiet regulation", instead of ignoring the phenomena. In the discussion of the 90's situation, a similar solution was mentioned as being used in Australia, Edinburgh, and proposed in England, using local alternatives to bypass political impediments. A process of similar disillusionment has led then to similar results, paradoxically prompting a return to the pre-Wolfenden days.

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[22] The Wolfenden Report , para.352.

[23] Connection between practising prostitution and immigrants was detected in research long before the latest wave of immigration: Friedman,I. & Peer,I. (1970) at p.173. And see discussion of relevant stigma in: Shoham,S.G. and Rahav,G., (1983) from p.106.

[24] Meiri,D.(1994).

[25] See for example: Friedman,I. & Peer,I.(1970), a research presenting drugs and prostitution as parts of the normative sub-culture to which both pimps and prostitutes belong.

[26] The Wolfenden Report , para 353.

[27] e.g. The foregoing reported cases. and in: Rappaport,A.(1994). Nae,B. (1994).

[28] 12.5.95. Reported in *Ha'ir*, 19.5.95.(A local weekly magazine of Tel-Aviv)

However, the courts have apparently continued with the policy of lenient penalties, ranging between short imprisonment sentences and high fines, even when the accused had been involved in a large scale exploitation[29] . The police have admitted to being unable to fight the situation which requires unavailable resources[30] .The problem has reached such proportions that in one article, a detailed map of prostitution in Israel, covering all its aspects, has been given[31] . A more blatant contempt of the law is hardly imaginable, urging a legislative change. Perhaps reality will precede theory in bringing a much hoped for reform, as it may have already started to do with the local licensing scheme.

The media's role in such a controversial issue has been ambiguous. It may have been at least partly responsible for the "vanishing" of the 1992 Bill, as the supporting reports that followed its progress presented it as "legalising" , a highly distorted picture of its true nature, which surely contributed to aversion among potential supporters, just as had been done with previous bills[32] . Thus, the subject was discussed in an article optimistically titled "Getting out of the streets"[33], including an architectural proposal for a brothel, proposals for professional prostitutes unions, fashion suggestions, income tax advice and proposals for advertising campaigns. The emphasis on the dramatic and amusing aspects of the issue appears now to have been premature, and may have destroyed the Bill's chances.

There have not been further legislative developments. As since the 1996 elections the power of the religious parties has increased, as will be discussed, legislation of the Bill seems highly unlikely. However, reports about Russian prostitution and Mafia have become an everyday matter. The practical situation, then, if not the theoretical one, necessitates an urgent action.

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[29] e.g. A case reported in:Karao,N. (20 May 1994).The accused was convicted, in a plea bargain, of procuration and managing premises for the purpose of prostitution. The penalty: 38 days imprisonment, three years suspended sentence and a large fine.

[30] e.g. in: Karao,N."(14 January 1994.

[31] "The map of prostitution" (1994).

[32] e.g.See discussion of 1979 Bill.

[33] "Getting out of the streets",(1992).

Homosexuals , male prostitutes and male rape victims

Elswhere in this account, emphasis has been on women, while men were secondary, whether as "villains" (the ponce, the customer, the battering husband) or as the majority of legislators. However, certain groups of males, particularly homosexuals, may have been subjected to much the same social labelling and legal treatment. The comparison will be based on the classification of those males as 'different' from the 'normal citizen', similarly to the prostitute or the complaining wife. Fundamental similarities are found in the historical powerlessness of these groups and in the way its sexual conduct has been, at least outwardly, frowned upon. The comparison is further enhanced by public perception that has stressed allegedly effeminate sides of homosexuals, equating them with women.

Although each of the following weighty issues may be deliberated at length, an impossible task here, a brief discussion of different aspects is nevertheless required, in order to give as full a picture as possible, comparing groups that have been for a long time regarded as inferior, and assessing whether their apparently increased social power has changed the legal situation.

Homosexuals and male prostitutes

Since the issues of homosexuality and male prostitution are entwined, a discussion of the latter would be incomplete without some consideration of the former. Only male homosexuality will be encountered, as dictated by the law. The question why lesbianism seems to have been more tolerated, less offending, will not be asked, restricting the discussion to prominent issues that have been evoked elsewhere in this study.

The previous law

Although the Wolfenden Report acknowledged that a man may solicit or importune for immoral purposes, the offence was discussed in the context of homosexuality[1], while discussion of prostitution was confined to female prostitutes. The view that a prostitute must be a woman was fundamental to the SOA 1956[2] and the SOA 1959[3], undisputed as only in the 1970's did the issue of male prostitution cause distinct concern.

This approach was verified in 1994, when it was held that the term "a common prostitute" for the purpose of s.1 of the 1959 Act was restricted to females and did not extend to encompass

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[1] The Wolfenden Report, para. 116.

[2] Street Offences Act 1956, s. 22,28,29,30,31.

[3] Sexual Offences Act 1959, s.1,2.

male prostitutes[4] , although the prosecution had persuasively argued that the Act should have been interpreted according to the targeted mischief, whether it had been Parliament's intention at the time or not.

The Israeli law, discussed later, has too recognised only female prostitution, and although a gender-neutral formulation has been suggested in the 1992 Bill, as long as it has not been accepted, differentiation remains.

S.32 of the 1956 Act, occasionally mentioned earlier, provided that it was an offence for a male person persistently to solicit or importune in a public place for immoral purposes, imposing a maximum penalty of two years imprisonment. The Wolfenden Committee proclaimed that the sex of the solicited person was not specified[5], therefore it could have applied to solicitation of man by man, to touting on behalf of prostitutes or to solicitation of females by males for immoral purposes. However, this provision was mainly used to prosecute males soliciting for homosexual purposes[6] , all sexual acts between men having been serious crimes under the SOA 1956, regardless of consent, age, and whether it occured in private. Fully aware of this biased use of the provision, the Wolfenden Committee nevertheless recommended its retention, since the law should not indicate "a general licence to adult homosexuals to behave as they please"[7] . It appears that the Committee was afraid of the inevitable repercussions of its own recommendations concerning homosexuals, in what may be regarded as at best ambiguity and at worst plain hypocrisy.

The Sexual Offences Act 1967[8]

The 1967 Act, which partially implemented Wolfenden's controversial recommendation to decriminalise homosexual acts in private between consenting adults over the age of 21[9] (with a few exceptions), also installed provisions pertaining to homosexual prostitution. As existing prostitution laws were not applied, and the new provisions differed in detail from previous ones, an arguably artificial difference between male and female prostitutes was created.

Before analysing the provisions, the twelve years gap between the Wolfenden Report and the 1967 Act needs explaining. Leo Abse, the MP who introduced the Sexual Offences Bill in the Commons, mentioned factors as diverse as fear of politicians of any repressed homosexual

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[4] *DPP v Bull* [1994] 4 All E.R. 411, [1995]Q.B.88.

[5] The Wolfenden Report, para. 116-124.

[6] especially since the aforesaid decision in *Crook v. Edmondson* [1966].

[7] The Wolfenden Report, para. 124.

[8] Hereinafter referred to as "the 1967 Act" or 'SOA 1967'.

[9] Sexual Offences Act 1967, s.1(1).

component within themselves, the emotions surrounding the issue (one minister refused to discuss this "disgusting" subject) , and the uncertainty of electoral opinion.[10]

The perceived relationship between public opinion and the law were firstly expressed in the "historical" argument, that it is easier to legislate than to undo legislation, hence safer to keep existing provisions, an attitude that has continuously provided rationalisation to the conservatives. Secondly, the House of Commons' hesitation to accept that public opinion was becoming less hostile to the Bill, indicated fear that Parliament may seem to be condoning or encouraging homosexuality. Those were the leading motives in Parliamentary debates since the Wolfenden Report, according to Newburn's detailed account[11] , indicating an underlying assumption that the law should avoid leading public opinion, although a radical guidance was not required here, at least regarding a large part of the population, the law probably trailing quite a way behind it.

Abse commented that the passing of the Bill was facilitated by the intake of academics and younger men to the House of Commons[12] . Only when the moral positions of the MPs and those attributed by them to the public (differing, apparently, from actual public opinion) had mellowed was it possible to pursue the change. Such an insider's admission of the importance of Gallup polls and MPs psychological and moral disposition to the process of legislation certainly enforces arguments about the extra-legal factors, the moral stance of the average middle-class, middle-aged, white, male MP, behind seemingly legal activities.

Honore argued that the male sex reserved strong revulsion to homosexuals (and ponces), not to prostitutes[13] , and this study has so far demonstrated it. Honore's attempt to rationally justify this revulsion[14] was hardly convincing. The first argument concerned homosexuality being a threat to the growth of population (therefore considered "unnatural"), an unconvincing claim in highly populated countries. The second reason concerned the threat on women's position, equally unsound where women have gained greater economic independence. Honore himself agreed that moral attitudes were not strictly limited by the purposes they ultimately served. Thus, homosexuality is allegedly condemned because it tends in general to cause those undesirable results. He justified the intensity of the moral stand, claiming that sexual urges were particularly strong, therefore a fierce opposition was necessary. As seen, similar unsound arguments, regarding male sexual needs, have been used to justify the forgiving attitude towards customers compared to prostitutes. Furthermore, the special place that sexual conduct has occupied in public consciousness has been imperative to this study.

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[10] Abse,L. (1968) .

[11] Newburn, T.(1992), ch.3.

[12] Ibid. at p.87.

[13] Honore,T.(1978), at p.133.

[14] Ibid.,at p.102-104

Even accepting Honore's claim that most people's moral and emotional outlook is based on the idea that men should ensure the survival and increase of human race, the question remains whether the law should accept this concept, in a world where its importance has diminished, in pluralistic societies where competing perspectives have risen, or whether the law could be used to guide people towards a more rational thinking. Abse himself saw the Act, and the surrounding debate, in the larger social context, as promoting a more rational society, a society coming to terms with "sexuality and aggression"[15] . The Act itself, however, did not apparently justify this optimism.

Another factor is the religious attitude, as homosexuality, ever since biblical times, has amounted to treason or blasphemy. Honore suggested that Protestant countries have been slower than Catholic ones to recognise the fact of male homosexuality, perhaps due to greater influence of the Old Testament.[16] However, the general religious reaction seems to condemn. In Scotland and Ireland, probably more influenced by religion, homosexuality between consenting adults continued to be a crime long after 1967.

Although Newburn pointed that in 1950s' Britain a process of secularisation and moral pluralism occurred, and legislation was less dependent upon conventional Christian mores, certain influence seems to have operated, even if indirectly, through the norms held and promoted by the legislator.[17] Newburn himself indicated the appointment of a devoted Catholic DPP in 1944 as influential on the 'purge' of homosexuals in post-war Britain.[18] Presumably, social changes were not widely reflected at Parliament, whose members' background has been rather homogeneous, predominantly white, male, middle and upper classes, hence traditional values, including religious, have not been abandoned.

Paradoxically, in 1952 it was the Church of England Moral Welfare Council's Report that advocated a legal reform to decriminalise homosexual behaviour, while still condemning homosexuality[19] . The religious element will be stressed further when reviewing morally dubious areas of the Israeli predicament, analysing the implications of an arguably more authoritative religion.

Hence, it is not surprising that the Act was far from liberal and, arguably, rational, although Wolfenden's basic distinction between 'public' and 'private' supposedly remained. The harsh maximum punishments and the possible narrow interpretation of privacy, that could lead to

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[15] Abse,L.(1968), at p.87.

[16] Ibid. p.107

[17] Ibid. p.161.

[18] Newburn,T.(1992) , p.49.

[19] As quoted in Newburn, Ibid. at p.50.

unreasonable restrictions, were immediately criticised[20] . Abse trusted the courts to moderate the effect of the Act, yet as the legislator's intentions were expressed quite clearly, the courts, even if they agreed with Abse's view, a doubtful assumption, could only impose a limited liberalism.

More profoundly, homosexuality was not decriminalised, it was merely permitted under strict conditions. The Sexual Law Reform Society rightly claimed that by removing only one category of homosexual behaviour from the criminal scope, the premise that homosexuality should be treated as more anti-social and generally criminal than heterosexuality, was maintained.[21] The circumstances under which a homosexual act would be legal are far more restrictive than those for heterosexuals: a higher age of consent, a narrow interpretation of "in private", specific occupational constraints (in the army, air force or navy).

Consequently, the Society advocated a further reform, corresponding with its discussed principles. As it considered that a maximum degree of free choice should be granted, and that the law should not enforce standards of sexual morality, its proposal included provisions relating impartially to all sexual conduct. A similar unification of offences has been continually endorsed here.

Only in 1994 were homosexual acts by members of the armed forces decriminalised[22].
However, even this seemingly progressive, if long overdue, development was criticised, for leaving intact provisions of service discipline Acts which still enabled prosecution of homosexuals[23]. Although prosecution guidelines have been narrowed, the Criminal Justice and Public Order Act's disregard presents the provision as another symbolic but lacking gesture[24] .

The age of consent

The 1967 Act determined the age of 21 as the age of consent[25] , then the age of majority. By contrast, the legal age for a girl to consent to heterosexual intercourse is 16, and the legal age of majority, since 1969[26], is 18.

This disparity raised objections both at that time and later, in the 90's. The debate is relevant to this discussion not only as it widens the range of cases in which prostitution would be criminal.

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[20] Abse,L.(1968) t.

[21] Grey,A. (1975), at p.330.

[22] Criminal Justice and Public Order Act 1994, s. 146.

[23] Rubin, G.R. [1996].

[24] It should be noted that outside the criminal law, unfair dismissals are currently being taken to the European Court and an internal review was generated by the Ministry of Defence. March 1997.

[25] SOA 1967, S. 1(1).

[26] Family Law Reform Act 1969, s.1.

as it would be for any prostitute under 21, but mainly as most of the involved arguments have concerned questions of morality and law. Moreover, the issue of protection of the young, perceived to be weaker and more susceptible to "corruption", has been a recurring theme, and paternalism has often been analysed as the only motive behind such legislation. Another aspect of the exaggerated emphasis on protection of the young has been detected in the severe penalties for offences against them, even when consenting.[27]

The fear of a corruption of youth, often connected to homosexual acts (but also encountered regarding prostitution), has been used extensively as a guideline ever since the Wolfenden Committee recommended to fix adulthood at 21.[28] Interestingly, a Church of England report advised the Committee the age of 17, just a year over the age of adulthood for girls.[29]

Critics persuasively claimed that a man who could decide whom to marry should have had the freedom to determine his sexual preferences[30] . However, traditional morality could not be forsaken. While legal gender equality would be achieved by lowering the age to 16, those who supported the encouragement of heterosexuality still held that the law should postpone the age of sexual majority as long as it reasonably could.[31]

Legislative attempts

In 1979, the Policy Advisory Committee on Sexual Offences advised to lower the age of consent for homosexual relations between men to eighteen.[32] Numerous reasons justified the recommendation, including 18 being the age of majority, the sufficient protection offered, and the greater parity of the sexes thus achieved. Furthermore, the legislation had, it was claimed, lost its effectiveness, and it would help young homosexuals between the ages of 18 and 21 to receive counselling without fear of prosecution. Nevertheless, the age of 16 was rejected, on the feeble ground that those two years would give the youngster "a longer opportunity to settle down into a heterosexual pattern".

Five female members of the Committee (including Mary McIntosh whose opinions have been mentioned), held the minority view, supporting lowering the age to 16. They based it on the fact that existing laws protected those who were not able to protect themselves, that a person's

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[27] SOA 1967, s.3.

[28] This motif is evident in The Wolfenden Report, (1956), para. 71,97.

[29] Newburn, T.(1992) , p. 54.

[30] e.g. see Honore,T.(1975) , at p.107

[31] Ibid. p.108.

[32] Home Office, Policy Advisory Committee on Sexual Offences, *Working Paper on the Age of Consent in relation to Sexual Offences* (1979). para 70.

primary sexual orientation was fixed early in life, their doubt whether such a change would be followed by an increase in homosexual activity among young people, the need to offer counselling for young people without the risk of prosecution, and the logical step to equate young men and women[33] .

Although the Committee observed changes in society's attitude towards homosexuality, and thought that the law should help homosexuals get help in order to come to terms with their situation and "lead more contented lives"[34] , a debatable task for the criminal law, the law had nevertheless remained unchanged until the age was finally reduced, to 18, in 1994[35] .

Despite the seemingly liberal reasons, then, heterosexuality was still officially endorsed, maintaining a basic difference in attitude and detail. The validity of the premise that heterosexuality should be encouraged was not disputed by the Committee, not even by the minority. Considering this, and the debate whether homosexuality would increase following the change, the minority's stance could be seen as just as biased. This prevailing, if hidden, perception, may explain this delay in legislative activity, and the ever retained difference. As regarding Kerb-crawling, official bodies were ambiguous, sending double-messages, not quite sure of the necessity of the change, while any legislation may have been interpreted as supporting homosexuality, presumably condemned by the public.

Procuration and solicitation

The 1967 Act made it an offence for a man to procure another man to commit with a third an act of buggery which by reason of s.1 of the Act was not an offence[36] . The maximum punishment was two years imprisonment. The provision potentially covered cases of procuring to become a male prostitute and touting clients for prostitutes.

This provision is fundamentally similar to procuring for prostitution, in that although the act itself is not criminal, procuring its commission has been criminalised.

As for persistent importuning or soliciting, the 1967 Act has not changed much the situation under s.32 of the 1956 Act. In *R. v. Ford* [37] the defendant argued that since the 1967 Act decriminalised consensual homosexual acts in private, persistent solicitation of a man over the age of 21 could not have been said to be importuning for "immoral purposes". However, the Court of Appeal concluded the 1967 Act merely declared that henceforth such conduct would

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[33] Ibid. Appendix A. p.25-26.

[34] Ibid. para.69.

[35] Criminal Justice and Public Order Act 1994, S. 145 .

[36] SOA 1967, s.4.

[37] *R.v.Ford* [1977]1 W.L.R.1083.

not amount to a criminal offence, and the words 'immoral purposes' covered different areas than 'criminal offences'. It would then be left for the jury to say whether in the circumstances the alleged conduct amounted in law to conduct for 'immoral purposes'. The advantages of leaving the decision to the jury were mentioned, regarding the interpretation of the term in the leading case of*Crook v. Edmondson* [38]. Nevertheless, as regarding kerb-crawlers a consistency between immorality and illegality was seemingly required, the conclusion is that the court was keener to criminalise homosexuals.

Furthermore, despite the flexibility that this procedure could allow, the very existence of an inconclusive, vague term, is questionable, especially concerning such a sensitive area. Besides, accepting the educational, leading role of the law, as desirable or at least inevitable, leaving a significant decision in the hands of laymen would be even more debatable (although that exactly has been one of the contentions about a jury system, an issue that will not be discussed).

Reports of the 1970s Working Party

The 1970s Working Party on Vagrancy and Street Offences was the first official investigation, since the Wolfenden Committee, of homosexual soliciting and prostitution.

The Working Party agreed with the Wolfenden Committee that s.32 should stand, asserting that homosexual soliciting "may well create greater revulsion than that produced by kerb crawlers or by female prostitutes...", even if there had been a shift in tolerance towards homosexual behaviour.[39] The discussion was brief, and no other reasoning was given besides this emotional argument and the remark that a wider review of the law on sexual offences was due.

This recommendation was criticised[40] as contradicting the Working Party's view regarding kerb-crawling, that the section had been "of nineteenth century origin", therefore unsuitable[41]. The unsuitable archaic origin had been conveniently forgotten in relation to homosexuals.

The only other recommendation was to lower the maximum penalty to a £100 fine or three months imprisonment, as the harsh penalties were directed at men touting on behalf of prostitutes, an apparently extinct activity[42] . One significant consequence of the reduced maximum penalty would have been the removal of the right to trial by jury, conferred by the 1967 Act [43].

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[38] *Crook v. Edmondson* [1966] .

[39] H. O. (1974), para.278.

[40] McIntosh,M. (1975a).

[41] H. O. (1974), para.264.

[42] Ibid.

[43] SOA 1967, s. 9(1).

Although commentators had urged a wider review of both offence and punishment, and suggestions were presented, including support for creating a general, gender-neutral soliciting offence, the Party remained resolute. The Report recommended the same; maintaining s. 32, diminished penalties, resultant elimination of trial by jury[44] .

McIntosh asserted that the Working Party's view of homosexual soliciting lacked the social realism that had concerned the issues of prostitution and the clients[45] . While this social realism is itself questionable, alleged differences in behaviours and purposes were used to explain the preferential legal treatment of the customers. It was not explained why the law should punish soliciting for homosexual purposes (not prostitution) yet ignore soliciting for heterosexual purposes, nor why there should be different laws regarding male and female prostitutes.

A reform, as McIntosh suggested, could only be the result of a deeper social understanding[46]. Thus, the Working Party should have recognised that there were some genuine annoyances that people ought not to be protected against by the law. Their prejudice that a homosexual prostitute was more annoying than a heterosexual one could be regarded in this context.

It seems that at the core of "social" attitudes such as McIntosh's, questions regarding the scope of the criminal law, and the removal of moral attitudes from its realm, may be traced. In its emphasis on the social context, McIntosh's stance is one of the preliminary signs to the changes of criminology in the 80's, especially the aforementioned Radical Criminology. Regarding all the studied issues, whether prostitution, homosexuality or marital rape, calls to view the law in a broader social framework will be explored.

Living on the earnings of male prostitution and Premises

The 1967 Act made it an offence for a man or a woman to knowingly live, wholly or in part, on the earnings of prostitution of another male, imposing a severe maximum punishment of seven years imprisonment[47] .

The courts later held that for the purpose of this provision, the earnings of a person who had undergone a sex change operation and practised prostitution would be regarded as those "of another male"[48] . As such persons were deemed to be women in other legal matters, and as a parallel provision concerning female prostitutes exists, this decision is curious. The degrading

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[44] H.O.(1976), para.101-105.

[45] McIntosh,M. (1975b), p.283.

[46] Ibid.

[47] SOA 1967, s.5.

[48] *R v. Tan* [1983] QB 1053, [1983] 2 All ER 12,CA.

effect and the possible consequences, including sending such a person to a male prison, were overlooked by the court. Had there been one provision only, regardless of gender, if legal unity had been sought, the problem would have been lesser.

Similarity with s.30 of the SOA 1956 includes the severe maximum punishment. However, two differences exist. The first is that women perpetrators were allocated a separate offence in the 1956 Act, s.31. Consequently, s.5 may be considered more just, not presenting undue divisions. The second difference is the lack of presumption of living on the earnings of a prostitute in s.5.

Although critics seem to have largely ignored this provision, the similarity between the laws implies that criticisms directed at s.30 of the 1956 Act could have been equally applicable. Although the considerable dissatisfaction surrounding the 1956 law had calmed by the end of the 60's, occasional comments still appeared. Thus, L.H.Leigh sensed in s.30 an "undertone of outraged morality", in ignoring a possible consent, and advocated a new law, based on reference to coercion, physical or mental.[49] Such propositions (as reviewed earlier) would have been just as relevant to s.5.

The lack of presumption would make it very difficult to prove the elements of the offence, much more so then regarding female prostitutes. The fundamental issue of rendering offences too easy, or, conversely, impossible to prove, by including different evidential requirements, has been a continuous theme in this account. A comment regarding presumptions as means for facilitating convictions was made elsewhere. The question whether this presumption is desirable regarding prostitution is weighty. If it is accepted that the presumption is superfluous, or downright harmful, then s.5 has been an improvement. The consequent discrepancy, however, between similars situations, is undesirable whatever one's view about the presumption's merits.

Another provision that has been largely ignored by commentators, altough the criticisms concerning the 1956 Act would have been similarly applicable, is the extended definition of a brothel[50], defining that premises would be treated for the purpose of s.33 to 35 of the 1956 Act as such if people resorted to it for the purpose of "lewd homosexual practices" in circumstances which would have led to it being treated as a brothel for the purposes of the law.

Summary

The public reaction to the 1967 Act appears to have been characterised by the focus on the "outrageous" provision decriminalising consenting homosexual relations, while ignoring the

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[49] Leigh,L.H. (1975b), at p.420.

[50] SOA 1967, s.6.

other, more punitive, provisions. As debates about the Act prevailed, utter silence regarding various points was just as indicative as lengthy discussions of others. It may indicate that society classified homosexuals in an even lower rank than prostitutes, who had generated at least some sympathy, and have often been perceived to be "victims" rather than offenders. The comparison of the differentiating perceptions of nuisance substantiates this conclusion.

Conspiracy to corrupt public morals

After the Wolfenden Report, there have been two major judicial attempts to prevent distribution of material concerning sexual behaviour which has not been in itself illegal, by extending the common law offence of conspiracy.

The first notable case, *Shaw* [51], which established the offence in this context, has already been discussed. The second, *Knuller* [52] , dealt with promoting or furthering homosexual acts between consenting adults in private, through magazine advertisements. Hence, at least one of the participants was a third party. Knuller was also charged with the related conspiracy to outrage public decency, regarding which an appeal was allowed.

The implication in *Knuller* , that anything which assisted or promoted the commission of legal homosexual practices was contrary to public policy, was criticised as contradicting Parliament's intention in passing the 1967 Act.[53] The court did not consider that as long as obscenity and public decency laws were not infringed, it would have probably served the public interest to allow this way of contacting partners.[54] The situation is comparable to that of advertising prostitution, where it was similarly argued that public interest could have benefited from allowing advertising, subject to general legislation regarding obscenity, without even resorting to the obvious theoretical benefits of not equating morality and crime so blatantly.

A Law Commission Working Paper recommended likewise, that the application of conspiracy laws be confined to agreements to commit actions which were crimes[55] . Most commentators espoused this view, mainly because of the disadvantages of the conspiracy offences' uncertain extent, leaving the court a considerable residual power[56]. The possibly dangerous extent of those offences was exemplified by Lord Morris, who remarked that a charge may lie in

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[51] *Shaw v. D.P.P.* [1961]op.cit.

[52] *Knuller (Publishing, Printing and Promotions) Ltd v. D.P.P.* [1973]A.C.435.

[53] e.g. Sexual Law Reform Society Report, (1975), at p.335.

[54] for criticism along those lines see: Honore, T. (1975) , at p.109. (Who thought that heterosexuality should be furthered by the education system.)

[55] Law Comm. Working Paper, *Conspiracies relating to Morals and Decency*(1974) para.44, 75.

[56] The Law Comm., *Criminal Law:Report on Conspiracy and Criminal Law Reform*,(1976).

advertisements for extra-marital sexual relations[57]. On balance between the objective that legal rules be clearly stated, and the adverse claim that a widely drawn offence would facilitate confronting future anti-social forms of behaviour, the Law Commission adhered to the Working Party's view[58], that in the sensitive sphere of obscenity and public morality, narrowly circumscribed offences could fill the lacunae in order to meet specific situations.

The decision was not adopted by the Criminal Law Act 1977, which abolished most of the common law of conspiracy.

This perception of homosexual acts as not criminal but not fully lawful either, that they remain undesirable, 'contrary to public morals', is akin to the detected judicial perception regarding prostitution. Citing Lord Reid's dictum in *Knuller* : "There is a material difference between merely exempting certain conducts from criminal penalties and making it lawful in the full sense."[59] It brings to mind Newburn's observation that the background to the public interest in prostitution and homosexuality, after world war II, had not been the result of tolerance, but, adversely, of moral panic.[60] The legal details have indeed indicated the continuous existence of fear and loathing.

The Israeli situation and sexual offences

Whether a man can ever be a victim of rape in the eyes of the law is another aspect of the significance of gender to offences burdened with sex and morality, essential to legal definition of non-consensual sexual offences, as well as to the key issue of autonomy and the law.

The rape victim's gender and homosexual acts have been linked, as most male rapes have occurred in a homosexual context[61] , and as bias has affected the legal treatment of both. Rape victims have been assumed to be female. A reluctance to fully recognise the male victim as such has apparently existed, an expected stance considering that all homosexual acts have, until fairly recently, been offences, even if rarely prosecuted, while a pre-requisite for legal condemnation would have been an acknowledgement of homosexual autonomy, the right to consent to homosexual acts or to refuse them. The official repugnance from the subject, coupled with social preconceptions and gender stereotyping, can explain the silence and the bigotry. Furthermore, as even legal treatment of 'classic', female victims, has been vastly criticised and

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[57] *Knuller* [1973] , p.460.

[58] Law Commission, (1976) , para.3.20.

[59] *Knuller* [1973] , p.457.

[60] Newburn, T.(1992), p.50.

[61] McLean,S.A.M. (1988), at p.205.

has not been vastly improved[62] , compassion towards male victims, the prerequisite for legal action, seems indeed a tall order.

The Israeli situation

The Israeli offence of rape, throughout the years and numerous legislative changes, has been categorically confined to female victims, ever since its import from England by the 1936 Criminal Code Ordinance.

The CCO 1936 provided the offence of sodomy against one's will using the same means as regarding rape[63] , and the offence of having unlawful sexual intercourse or committing an act of sodomy with a child under the age of sixteen years, regardless of the child's consent[64]. These offences, although prescribing the same maximum punishment, were not classified as rape. A further offence proscribed having "carnal knowledge of any person against the order of nature" or permitting "a male person to have carnal knowledge of him or her against the order of nature"[65]. In 1961, the age of consent was raised from 16 to seventeen, concurring with the minimum marriage age.[66]

The implication of deviancy against nature itself, not only against social (moral) norms, may be hard to accept now, particularly as the scope of liability was wide enough to include acts done between husband and wife[67] . Yet, the 1977 Penal Law adopted the formulations of both the offence of sodomy [68], and of "deviations from the order of nature"[69]. The continuous existence of the offences in Israel necessitates discussing consensual and non-consensual acts jointly. the importance of legal interpretation of consent, as determining the legal intervention, has been repeatedly recognised, and is exemplified here by the disregard of consent.

The expressed intention to ignore, as much as possible, the victim's gender, was a radical feature of the reviewed 1980 Bill[70], emphasising instead elements of the sexual side of the

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[62] See later discussions of female rape victims.

[63] CCO 1936, s.152(b). Rape: s.152(a).

[64] Ibid. ss.(c).

[65] Ibid. s.152(2).

[66] Criminal Code Ordinance Amendment Law,1961.

[67] In Cr.A. 224/63, *Ben-Ami v. The Legal Advisor of the Government*, 18(III) P.D.225 , the offence was confined to anal intercourse, only where a woman was involved. The invasion of the criminal law into the realm of consensual activity between married people, is similar in its ludicrousness to that in *R. v Wilson*, [1997] Q.B.47. Indeed, J. Cohen urged the legislator to change the archaic law (at p.238).

[68] Penal Law, 1977, s.350.

[69] Ibid. s.351.

[70] Penal Law (Amendment no.14)Bill1980.

violence or sexual quality of acts done in a person without his valid consent[71]. The proposed rape offence incorporated sodomy in a non-gender-specific formulation, and punishment would have risen to sixteen years imprisonment, or twenty years under aggravating circumstances[72].

The 1980 Bill suggested changing the title of the chapter from "Offences against morality" into "Sexual offences", indicating a shift from an attitude based upon a dominant morality, imposing a "moral stigma" on the victim, to an approach classifying the behaviour as forbidden following the harm to the other or to public order.[73] This explanation is reminiscent of the discussion of Wolfenden's attempt to define the purpose of the law in utilitarian measures rather than moral ones. (Although it may still be argued, as done about marital rape, that even the term "sexual offences" is inaccurate, as the violence should be emphasised, the violation of autonomy, similarly to any offence against the person.)

However, the gender neutrality, the truly innovative feature of the 1980 Bill, has disappeared in the 1986 proposal[74]. The final version was altogether more conservative. Retention of the traditional view of the female victim of rape necessitated maintaining the offence of sodomy, where the perpetrator could only be male, covered in the 1980 Bill by other offences, as a broader definition of "intercourse" had been proposed. Attempts to forgo the term "penetration", have so far been unsuccessful[75], a failure that indicates the persistence of perceptions.

The eventual dismissal of the 1980 suggestion apparently attested to a gender differentiation more deeply ingrained than had been presumed by those members of the Knesset who proposed it. This conclusion is unexpected, considering that the Bill was governmental, not usually known for their radical nature. Its liberalism should not, however, be overrated, as homosexual acts would have still been criminalised[76]. Criticisms were acknowledged[77], and modifications were proposed, including changing the original title "deviations from the order of nature" into the less charged "an act of sodomy", and reducing the punishment to one year's imprisonment, yet this archaic formulation was not precluded.

Legal developments

By 1988, the major offences of rape and unlawful sexual intercourse remained gender-

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[71] Ibid., at p.387.

[72] Ibid. s.1, suggested new s.346.

[73] Penal Law (Amendment no.14)1980, at p.388.

[74] Penal Law (Amendment no.26)1986.

[75] See Hauftman,Z.(1982) , p.201.

[76] Ibid. p.392, suggested new s.351.

[77] For an account of the numerous attempts to abolish the provision regarding consenting adults see: Rubinstein, A. (1975),from p.18.

conscious, while sodomy, sexual attack and indecent acts, defined the victim as "a person". The legislator finally acknowledged the gravity of lack of consent, drawing an analogy with rape in defining coercive sodomy by referring to the elements of rape, imposing the same punishment.[78] Therefore, the separation of offences seems unnecessary and artificial.

Consensual sodomy has remained an offence when the victim's age is between fourteen and eighteen years old, punishable with 5 years imprisonment[79], comparable to the discussed English situation[80].

As the heterosexual age of consent is sixteen (fourteen if the age gap is no wider than two years), and young girls are not protected by the same provisions, both in England and in Israel[81] , equality is still desired. Despite the considerably reduced punishment, the conduct is still unlawful. Rubinstein has suggested, regarding the general age of consent, that the higher the age, the more moral considerations (such as promoting matrimonial sex only) had affected the legislation[82] . Similar moralistic and paternalistic influences have been pertinent to the age of consent regarding homosexuals. The fear for the "moral safety" of the young, tackled frequently, was evident again. The fights in Parliament and in the Knesset over lowering the age by a year or two indicated a fundamental resistance to accept homosexuality, the hope that by keeping the age of consent high enough young men will be deterred from practising it. The proscriptions in both countries have transcended the widely accepted wish to protect the minor who is presumed incapable of grasping the nature of the sexual act or its results.

Additionally, the Israeli political weakness was hardly surprising given that the religious political parties considered life without the "offences against the order of nature" to be "a moral jungle"[83]. The perceived role of the criminal law as a tool for imposing morality could not be demonstrated more blatantly. The relationships between religion and state in Israel have apparently dictated the law, in matters that have not been directly connected to any religious procedure or mechanism but only to moral norms, although the undesirable provision was not worse than the English one.

Remarkably, the law, even prior to its abolition, had not been used against homosexuals,

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[78] Penal Law (Amendment no.22)1988 , s.347(b).

[79] Penal Law (Amendment no.22)1988 ,, s.347(b).,. s.347(a).

[80] See discussion of the 1994 amendment.

[81] Sixteen as the age of consent in Israel was imported from England via the CCO 1936, s.152(1)(c), and later changed to seventeen. The debate in the Knesset (following suggestions to raise it to eighteen) centred around the "moral decline of the young": D.K., (32) 1961, p.151, per MK Sanhedray. Seventeen was agreed as consistent with the minimum age for marriage, another indication of the link, translated into legal language, between marriage and sex.

[82] Rubinstein, A. (1975), at p.21.

[83] D.K., (40) 1964, p.2350, per M.K. Lorenz.

following directions of the Legal Advisor to the Government[84] . Despite the welcome effect, the situation could be criticised, as commensurate to legislation by a non-legislative body. Although it helped to bypass the obstacle of the religious parties and political pressures, the desirability of such unconstitutional practices is nevertheless doubtful. Furthermore, a declaration made by the Knesset would have been significant to removing the social disgrace attached to homosexuality. According to Rubinstein, the same process occured regarding sexual intercourse with an under-age girl, where the Legal Advisor directed that prosecution should be brought only where coercion, pressure or authority were involved[85] .The unsatisfactory picture is of an over-protective, morality based law, whose unenforcement would arguably lead to disrespect. A discussion of constitutional reservations and the declaratory effect of the law, will be developed regarding marital rape and judicial legislation.

Male rape

Legally recognised male rape is of particular importance to this study. While the previous persisting silence of the law indicated a fundamental refusal to acknowledge a certain reality, probably morality dictated, the recent recognition may be interpreted as showing greater flexibility, awareness that gender is not a barrier, that men too can become victims of sexual violence (although the perpetrator would usually be male[86]).

Paradoxically, although the particular disgrace of homosexual acts was imbued in the maximum punishment of ten years imprisonment for an indecent assault upon a man[87] , compared to two years for an indecent assault upon a woman[88], yet the SOA 1956 did not recognise the term "male rape". The only plausible explanation is Parliament's desire to show that it preferred heterosexual tendencies. One did not have to endorse homosexuality in order to realise that the disparity was exaggerated, pointing it as a legislation based on passion rather than reason.[89] However, it took thirty years for the difference to be abolished[90] .

A decade later, in 1994, an amendment to the Criminal Justice Bill extended the definition of

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[84] The directions required proceeding only where a minor under the age of 18 was involved, where coercion was practised, in a public place or where existed a relationship of dependency or authority. See Rubinstein, A. (1975) , at p.21.

[85] Rubinstein, A. (1975), at p.23.

[86] McLean,S.A.M. (1988), at p.205.

[87] SOA 1956, s.15. (the same maximum punishment is available in s.16 regarding an assault with intent to commit buggery).

[88] SOA 1956, s.14

[89] Honore,T.(1978), p.155.

[90] By theSexual Offences (Amendment) Act 1985.

rape to include all acts of non-consensual intercourse, with a maximum life sentence[91] . Perhaps significantly, this amendment and the statutory abolition of the marital rape exemption were accomplished concurrently[92], curbing, if not abolishing[93], two legally affirmed prejudices and signifying, as well as emanating from, the acceptance of alternative definitions of rape[94]. Both moves were hardly quick Parliamentary responses. Proposals to remove gender bias from the law regarding sexual offences had been made in 1985 by the Howard League for Penal Reform. supporting the recurrent observation about the link between power of groups and their effect (even if indirect) on legislation, as both women's and homosexuals' social and political power has clearly grown, compared to their almost complete powerlessness of several years ago.

The symbolic meaning of the legal formulation should be appreciated. Just as some commentators struggled to differentiate between 'rape' and 'marital intercourse without consent', striving to avoid the degrading connotations, the long standing distinction (still existing in Israel) between 'rape' and 'buggery without consent', has indicated a differentiating perception and condemnation, not yet regarding the term 'rape' as applicable to this comparable act, however vast the similarity. Comparison to prostitution is also relevant, not only as another example of still influential gender roles, but as the appealing option of a relatively gender-neutral law has been discussed in that context, as have been its frequent dismissals, despite growing criticism of unsuitability.

One obvious source of commentary would be feminist or radical theories, who have traditionally supported the struggle of vulnerable groups. Ostensibly, the attitude expressed in the Israeli 1980 Bill and in the English 1994 Act is consistent with an essential feminist view stressing that "rape is about violence, not sex[95], emphasising the aggression and struggle for domination over the weak, thus aiming to eliminate undesirable peripheral elements of the offence, including inquiries into the victim's sexual history. Distinguishing between rape and a coercive act of sodomy would hence be a technical, unwarranted strategy. Abolition of the difference would also contribute to grading offences according to severity, abolishing classification into many categories according to quaint legal (or moral) concepts.[96]

Several commentators have recognised the significance of the expanding victim group to the

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[91] S. 1 of the Sexual Offences Act 1956 as amended by Criminal Justice and Public Order Act 1994, s. 142, following a move by Lord Ponsonby of Shulbrede.

[92] Hansard, Parl.Deb.,comm. 1994,vol.241, col. 174, 176,177, op.cit. By the time the issues reached Parliament, marital rape had been so uncontroversial that the male rape debate overshadowed it.

[93] An optimistic view to this effect may be found in: "Rape law helps male victims", (1994).

[94] See especially MP Mildred Gordon's view in: Hansard, Parl.Deb.,commons 1994,vol.241, op.cit., col. 179.

[95] See sources in: Sebba,L.(1992) , at p.70. See later discussion of opposing feminist arguments.

[96] e.g. Sebba,L.(1992) , at p.68 supported this view generally in relation to sexual offences.

gender stereotyping embodied in the law[97]. Feminists have argued that the heterosexual, gender-based definition of rape has contributed to the generation of sexual mythology, eventually hurting the victims themselves[98] . Accordingly, legal changes, even if more symbolic than practical, would challenge fundamental gender presumptions, hopefully leading to the decline of moral implications too often attached to female and male victims alike.

However, perhaps unexpectedly, gender-neutral sexual offences have not been unanimously supported by feminists. MacKinnon, for example, argued that it may only obscure the sex specifity of the problem[99], harming the overwhelming majority of victims, invariably female, further than existing legislation has done. MacKinnon obviously thought that the advantageous combined power of the two groups would not outweigh this fault. Similar reservations about prostitution laws have not been found, although it may be compared a certain observed feminist reluctance to pursue prostitutes' rights, as if support would somehow degrade other women's position. Furthermore, a similar disagreement will be discussed regarding marital rape, where an ostensible ground for keeping a separate offence has been victims' benefit. It nevertheless appears that any legal willingness to protect autonomy, while forsaking prejudices, should be welcomed, as long as legal principles are not consequently abandoned.

Another point worth considering is judicial acceptance of provocation due to homosexual advances in murder cases, although this issue, more prominent in the USA, will be discussed very briefly[100]. If this plea is accepted, these two opposite stances, legal recognition of homosexual rights on one hand, through recognition of rape, and accepting the most extreme heterosexual prejudice on the other, in the alleged provocation, can hardly be logically reconciled. It would indicate again that social changes have affected legislation to a certain extent, but prejudices still prevail, throughout the legal system.

A comment on AIDS and the prominence of the homosexual issue

In contrast to the many references made throughout the years, specially in feminist and radical literature, to the Victorian Contagious Diseases Acts as the abominable and discriminatory origin of present laws[101] , there has been little mention, at least in professional legal literature, of AIDS as possibly urging changes in prostitution laws, although, theoretically, it could have served to

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[97] e.g. McLean,S.A.M. (1988) ,at p.204.

[98] Ibid.

[99] MacKinnon, C. (1993) , at p.615.

[100] See later detailed discussion of provocation.

[101] e.g. the aforementioned comments in Sumner, M. (1981), p.90

promote both decriminalisation, in pursuit of control[102], and enforcement of stricter criminal law measures[103] . In Australia, for example, controlling the disease has been mentioned as the major drive for regulating brothels, in certain states, as a "common sense approach" supported by conservatives and left wingers alike.[104]

In Israel, this consideration was raised regarding the 1990 Bill, justifying regulation[105] . In England it seems that focus, as far as the issue of AIDS is concerned, has been primarily on homosexuality and remained so despite further developments. As AIDS has caused public anxiety at least since the mid-80's, resulting in a wave of critiques, and as its possible connection with prostitution has been widely recognised, it may have been a legitimate consideration. Prostitutes have been categorised among the high risk groups, thus added to the list of the associated with the disease, along homosexuals and drug abusers, all contributors to the attached stigma.

AIDS has certainly influenced re-emergence of moral arguments concerning homosexuality, and although calls to re-criminalise homosexuality were rejected, specific legislation nevertheless emerged, including the curious Local Government Act 1986, which prohibited the promotion by local authorities of homosexual relations as "pretended family relationship".[106] The political connection was clear. Newburn regarded the moral discourses surrounding AIDS, including this provision, as a clear example of discussions of morality in the 80's stemming from the Thatcherite New Right.[107] A more blatantly expressed preference of heterosexual family values is hardly imaginable.

Public focus has remained on homosexuality as other issues were raised by gay activist groups, mainly the battle to reduce the age of consent for homosexuals to 16, (a discriminatory situation that has been reviewed) which incited demonstrations [108], and even resorting to the European court.[109] This was accompanied by another moral crusade against promoting homosexuality

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[102] One rare example: Almond,B. (1990), at p.19. Another writer mentioned the unlikely support of the Mothers' Union of legalised brothels: Lopez-Jones,N.(1992). Lopez, a member of a prostitutes' organisation, opposed it, as regulated brothels did not help the high HIV rate in Germany.

[103] Orr mentions calls in the US to enforce laws against prostitution rigorously. Orr,A. (1990), at p.123.

[104] Based on interviews with Australian politicians in a television program that compared the situation there, especially in Victoria and Canberra, to that in England. "World in Action - Sex off the Streets", ch.4, broadcasted in Feb.1995.

[105] D.K.(122)1991, p.4244.

[106] Local Government Act 1986, s.2A , inserted by the Local Government Act 1988, s.28.

[107] Newburn, T. (1992), p.187.

[108] e.g. see reports in *The Independent*, 15 March 1994. *TheSunday Times*, 23 Jan.1994.

[109] *The Independent*, 3 February 1994: "European court's gay sex ruling could embarrass Tories."

and allegations against the excessive political effectiveness of the "gay lobby".[110] AIDS was a consideration here, too, as it was claimed that the illegality for young people had been a constraint on education and pressure for safe sex.

One relevant argument was that gender equality generally meant more freedom, whether of homosexuals or women.[111] With the ambiguity towards women and homosexuals alike, it is not surprising that the changing power division generated fears of losing control. Male heterosexual morality seemed to be threatened (specially under the right wing political climate). AIDS however has led to unexpected complications in sexual politics. Despite winning on some fronts (the age of consent lowered to 18), vulnerability is still felt. Only recently, the battle of Airline workers to gain benefits for their partners attracted similar responses.[112] The similarity between the struggle of women and that of homosexuals does not end with the pursued targets, then, but extends to the paradox that the stronger their political power, the more hostile and frightened responses it has evoked from other groups, usually stronger in the political arena.

Besides the resurgence of moral arguments, AIDS could have also undermined the analysis of certain offences as victimless crimes. Thus, West remarked in the 70's that victimless crimes linked with sexual behaviour may have been justifiably regarded by legislators as socially dangerous in times when incurable diseases had been common.[113] Could not this argument become relevant again?

Most of the legislation in the UK has encountered reporting HIV cases and has not introduced criminal measures.[114] Certain suggested legislation was, however, strikingly similar to the much criticised 19th century Contagious Diseases Acts, raising the same questions. For instance, Seighart's[115] discussion of the legitimacy of AIDS related policies in view of human rights, such as compulsory registration of carriers, mandatory testing, using the criminal law for preventing or inhibiting behaviour thought to assist the spread of the disease, all measures that had been employed regarding prostitutes[116]. Furthermore, Seighart's conclusions were similar to those concerning the Contagious Diseases Acts, namely, that such violations could not be justified as a matter of human rights law.

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[110] e.g. Oddie,W., *The Sunday Times*, 23 Jan.1994.

[111] Spencer,C. *The Guardian*, 16 Feb. 1994.

[112] Blundy,A., *Independent on Sunday*, 26 Feb.1995.

[113] West,D.J. (1974) , at p.471.

[114] e.g. The AIDS (control) Act 1987.

[115] Sieghart,P. (1989) at p.38,40.

[116] The list of measures concerning prostitutes, upheld by the American courts, included compulsory tests, vaccination, reporting, quarantine, detention, examination and sterilization. in: Faden,R.R., Geller,G. and Powers,M.(ed.)(1991) at p.168.

Unsurprisingly, then, a historical perspective, in recent accounts of AIDS, depicted a pattern. Hence, Allan Brandt's assertion that in America venereal diseases became a metaphor for the anxieties of the time, having powerful socio-political implications[117], seems just as relevant regarding AIDS, when certain people have attempted to equate yet again the dispensation of morality and disease. Equally pertinent is Gostin's proposition that private rights were subordinated to public interest, social prejudice often providing the principal basis for action.[118]

Thus, the significance of social reactions to AIDS is not restricted to the possible connection to prostitution[119] (when emphasis has been on male prostitution[120]) or in comparison to previous laws, but through the principle of legislating morality when panic strikes, preferring social control over autonomy and individual rights, and introducing new criminal measures when the involvement and success of such intervention is most controversial.

It is impossible to discuss the politicisation of sexual activities in the last decades without considering these recent developments. It seems that Orr's hope that the AIDS epidemic may cause society to consider with greater honesty issues which had previously been clouded in prejudice and discrimination, especially concerning sexuality[121] , is yet to be fulfilled. For some, sexual attitudes have obviously turned a full circle from the "permissiveness" of the 60's, and with it a new-old morality has prevailed.

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[117] Brandt,A.M.(1993) . His short account of the 1920-1930 American crackdown on prostitution, described as "the most concerted attack on civil liberties in the name of public health in American history", closely resembles accounts of the Victorian laws, although in the U.S. the constitutional implication was the first consideration.

[118] again, in relation to regulations concerning prostitutes in America, at the turn of the century. Gostin,L. (1993, p.62-63.

[119] A wave of prosecutions in the U. S. exemplifies the connection. Male prostitutes were charged with soliciting sex while knowingly infected with HIV. in: Dalton,L.H. (1993),p.254.

[120] *Independent on Sunday*, 23 January 1994: "One in three rent boys has HIV, says study."

[121] Orr,A. (1990) , at p.124.

Marital Rape - Israel

The unique feature of marital rape is the relationship between perpetrator (who is, invariably, male) and victim (a woman, his wife). But, should this feature exempt him from criminal liability? Morality has apparently dictated, until quite recently, the obliviousness of the law and the view of marriage as a redeeming factor.

Legislation regarding rape and other sexual offences

The Criminal Code Ordinance 1936 and The 1977 Penal Law

The offence of rape was set in the CCO alongside other "offences against morality", including prostitution offences and other offences concerning sexual conduct[1] .

The offence was defined as having unlawful sexual intercourse with a female against her will by using force or threats of death or severe bodily harm, or when she was unconscious or otherwise incapable of resisting[2]. The maximum punishment for the felony was fourteen years imprisonment. The relevant elements of the offence, then, besides the physical aspect, were the unlawfulness of the act, the victim's gender, and the denial of free will, often by use of force. These elements have affected the issue of marital rape and the gender bias embodied in the current law, which will be examined here.

The 1977 Penal Law followed the CCO[3]. Rape by deception[4], and unlawful sexual intercourse with a minor under the age of seventeen[5], have been similarly amended.

Another angle which will be highlighted is the protection of youth from sexual offences, as from prositution, which has influenced legislation considerably. Concerning sexual and violent offences within the family, as will be seen, the picture has been more complicated, as family relations have often led to application of contradicting morals, embodied in the elusive "family values", and interests. The concern has occasionally been translated into special provisions. Thus, the CCO, followed by the 1977 Penal Law, provided the offence for a husband to have

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[1] CCO 1936, Ch. XLIV.

[2] Ibid., s.152.

[3] Penal Law, 1977, s. 345, duplicated CCO 1936,s.152(1)(a) .

[4] Penal Law, 1977, s.346 , following CCO 1936, s.153.

[5] Penal Law, 1977, s. 347(b), following CCO 1936, s.152(1)(c) and (3).

sexual intercourse with his wife if she was under fifteen years old, unless a medical certificate had been obtained, punishable with two years imprisonment (being classified as a misdemeanour)[6] .

An additional provision prohibited illicit relation with an unmarried girl between the ages of sixteen and twenty one, where special specified relationship between perpetrator and victim existed, including where she was his descendant or his wife's[7], punishable with five years imprisonment. Consequently, if the girl had been married and within this age limit, if the perpetrator had not used force, or any of the other means specified in s.152(a), the conduct would not have constituted an offence, although the special relationship may have still impaired her resistance and autonomy. It was rightly criticised as "so illogical that it ought to be revised even apart from the question of unlawfulness".[8] The incorporation of the marriage factor into the criminal law has, then, been problematic in more than one instance. The 1977 Law nevertheless adopted this provision, although the age has been reduced to seventeen, conforming to the modified s.152[9] .

The Israeli law, then, essentially following its Mandatory predecessor, has, at least until 1988, adopted the traditional, arguably archaic, 18th century Common Law approach. Rape could only be committed "by force, fear or fraud" although in England this definition had been judicially abandoned earlier, and a statutory definition to this effect was enacted in 1976[10], emphasising the lack of consent as the crux of the matter[11] . As the element of using force has been accumulative to the lack of consent and a variant of the other alternatives which would have denied consent[12] , its impact has been predictably ample. However, for the purposes of this discussion the question of force is not crucial, although the issues of consent and autonomy are, and it will be mentioned later. The questionable element has been the "unlawfulness" of the act.

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[6] CCO 1936 , s. 156, Penal Law, 1977, s.349.

[7] CCO 1936 , s. 155.

[8] Livneh,E. [1967], at p.422.

[9] Penal Law, 1977 , s.348.

[10] Williams,G. (2nd ed. 1983), 236. Sexual Offences (Amendment) Act 1976, s.1.

[11] Smith,J.C.&Hogan,B (7th ed. 1992), at p.454.

[12] Kedmi, Y. (1989)vol.2 , at p.626.

"UNLAWFULLY"

The early years

The offence of rape, for over 50 years, since it had been set in the Ordinance, until the 1988 amendment, contained the term "unlawfully". However, it was not legislation but the judiciary that has bestowed the term its operative meaning, and thus led to its eventual abolition.

The Israeli Supreme Court was in a difficult position, as English precedents which had been binding for a long time could not be easily rejected when the words of law had not been changed, particularly as the first cases were prosecuted when the 1936 Ordinance was still in force. Historically, the basis of this law throughout the British Commonwealth (including Palestine) had undoubtedly been Hale's thesis[13] . Furthermore, the colonial law followed mid-19th Century English codification attempts, although these had been dismissed in England.[14] The omission of the term "unlawful" from the offence for a husband to have sexual intercourse with his wife if she was under fifteen years old, confirmed that unlawful intercourse was extra-marital intercourse[15] .

On the other hand, the victim's predicament clearly concerned the court, that considered the act from the outset as deplorable as any other rape. Furthermore, the uneasy relationship between Mandatory legislation and the Israeli one, elucidated earlier, has affected the interpretation of the relevant provision, as for many years the legislative adoption (although not necessarily that of the historical background) remained. The court had then to determine the existing law, the desirable law, and whether the gap between the two could be bridged. The analysis will show that throughout the years the court has been persistent only regarding the desirable law, an unmitigated rape offence without exceptions for matrimonial acts.

In an early matrimonial violence case, the Supreme Court rejected an attempt to use English precedents regarding a common assault charge. As the English authorities had not entitled husbands to use force even in exercising their right for intercourse, in this case, where his sole purpose was to gain evidence of infidelity, he would clearly not have been allowed to use it.[16] Moreover, the Court distinguished the laws, claiming in an obiter dictum that the English ruling may not be applicable in Israel, expressing its dissatisfaction with matrimonial exceptions.

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[13] Livneh,E. [1967], at p.418. Livneh's article included a comprehensive review of the British Colonial laws, compared to legislation in other countries at the time, Common Law as civil law countries.

[14] Shahar,Y. (1981), at p.678. However, Shahar doubted whether Hale's doctrine had actually been generally accepted in England at the time of the Ordinance codification, casting a doubt on the historic necessity of the adoption of the doctrine in Israel.

[15] Livneh,E.(1967), at p.415.

[16] Cr.A. 63\58, *Agami v. The Legal Adviser*, 13[I] PD421.at p.435-436.

Another early appeal attempted to interpret "unlawfully" as "without consent". However, the Court adhered to the English interpretation, that the term usually meant "outside the bond of marriage".[17] The Court quoted the English rule determining the irrelevance of consent, as the husband's right resulted from the matrimonial duties, following either from the status of marriage or imlplied from her general consent for intercourse given upon marriage.[18] The original 1682 formulation of Hale's rule was cited[19] . Justice Halevi was the first to indicate the undesirability of this doctrine, saying that as it contradicted both the human dignity and the dignity of marriage, it could only be adopted by an explicit order of the legislator.[20] Furthermore, Halevi stated that "a wife is not her husband's captive, and she is just as entitled to the bodily freedom." This reference to women's autonomy, capturing the crux of the matter, would be often cited in subsequent cases.

Although in *Al-Fakir* this opinion was merely an obiter dictum, the Supreme Court restricted the application of the rule to cases where the law regarding the personal status of the couple had imposed this duty,[21] citing English cases which had established exceptions to the rule where the woman's duty had been revoked by court or by a mutual agreement.[22] The English authorities had obviously been more restrictive[23], and mentioning them in this connection has seemingly been a rather unsound attempt to support the Israeli view. This interpretation, adding a crucial proviso, has changed the legal situation.

In Israel, the administration of the law, in the area of family law, has essentially been left for the religious authorities of the various communities, ever since the Ottoman occupation. The situation remained similar under the British Mandate, although art.51 of the Order in Council defined the term "matters of personal status" differently, somewhat limiting the exclusivity of the religious courts[24] . This continuous official religious normative system was described regarding prostitution, but is even more relevant here, as familial perceptions have been fundamental to the issue of marital rape. According to Israeli law, a person is still being born into a religious congregation, and is subject to its establishment and laws regarding personal

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[17] Cr.A. 181\57,*Beky v. The Legal Adviser*, 12 PD146.

[18] Cr.A. 353\65,*Al-Fakir v. The Legal Adviser*, 18[IV] PD200, at p.212. Cr.A. 354\64, *Cativ v. The Legal Adviser*, 20[II]PD136, at p.238.

[19] Cr.A. 353\65 *Al-Fakir*, at p.218, per J. Halevi.

[20] Ibid.

[21] Cr.A. 354\64, *Cativ v. The Legal Adviser*, op.cit.

[22] *R v Clarence* (1888),22 QBD 23.; *R v Clarke* (1949)2 All ER 448; 33 Cr.App.R.216. *R.v.Miller* (1954)2QB 282; (1954)2All ER 529. Cited in *Al-Fakir*, op.cit., at p.219.

[23] e.g. in *Clarence* case Stephen,J. mentioned that he had withdrawn a statement from his book to the effect that a husband may be indicted for rape.(op.cit., at p.46). In *Clarke* the possibility had indeed been raised, but the jury acquitted the defendant. In *Miller* the couple had separated, but the jury were still directed that a charge of rape could not be reached.

[24] Ginossar,S. (1966) , at p.382.

status[25], a dichotomy that has attracted most feminist criticism, alongside rape[26]. Additionally, Jewish law has remained a legitimate source for legal interpretation[27] . In this instance, however, the personal religious law had a unique position, being the means that enabled the Court to depart from English precedents without officially rejecting them. This incorporation of personal law into the criminal law, according to Shahar, had definitely not been of English origins, as the application of criminal law regarding substantive matters in England had been wider, even where foreign elements with different personal laws had been involved.[28] Despite the bigger friction between personal law and other laws in Israel, there, too, such reference has not been a common occurrence, but a significant move.

Reference to the personal law led to focusing on the very specific circumstances of every case, leading to enormous legal and practical complications. In the first few cases presenting this interpretation, the involved were Muslim.[29] In *Al-Fakir* [30] the accused were two Bedouins who had exchanged minor relatives, without their consent, to become their wives. A further complication, at the time of the exchange the 13 years old girl had been married by her father to a third person, with the stipulation that he would not have sexual intercourse with her for two more years.

In determining the allegedly illicit intercourse, the court had to verify whether a duty of intercourse had existed in the Muslim law. Beforehand, though, it had to decide which of the Muslim laws should rule, and to scrutinise the validity of the alleged marriage according to the applicable personal law. Furthermore, as it was claimed that the girl had been married before, the validity and implications of this first marriage had also to be assessed.

In their quest, the Justices had to consult the Muslim Family Law, 1917, and the Ottoman Muslim Justice Law, 1917. J. Halevi went even further, to trace the foundations of sexual morality of the Islam (i.e., prohibited relationship with a married woman) back to the Jewish religious law, drawing a comparison between monotheist religions' morality.[31] While the desirability of turning to religious concepts to justify decisions is, at best, doubtful, it is even more so when the concerned law is one of which the judge's presumed knowledge is probably

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[25] Law of Jurisdiction of Rabbinical Courts (marriages and divorces)1953. Law of Woman's Equality of Rights, 1951. s.5.

[26] e.g. Raday,F. (1982).

[27] See later discussion.

[28] Shahar,Y.(1981) , at p.682.Shahar also traced Hale's doctrine's origins, not to a Christian view, but to a social-moral attitude of a group, showing that the imported law had not been based on a specific religious stance. [But see discussion of English reference to its religious origins]

[29] Cr.A. 181\57,*Beky v. The Legal Adviser*, op.cit. Cr.A. 353\65,*Al-Fakir v. The Legal Adviser*, op.cit. Cr.A. 354\64, *Cativ*, op.cit.

[30] Cr.A. 353\65,*Al-Fakir*, op.cit.

[31] Ibid. at p.226.

imperfect, so that decisions, based on sketchy knowledge, may be led by the coveted outcome. A contributing factor might have been the court's awareness of the possibility of coercive marriage, still existing among the varied Ethnic groups in Israel, as hinted by J. Halevi[32]. This situation would have deprived the English reasoning for allowing marital rape of any reasonable contents, as it would have been hard to find even an implied consent in such a case.

As the marriage was held to have been pending until the affirmation of the girl's father, which had not been given, the case was not one of marital rape, but of unlawful sexual intercourse with a minor. The appellant's conviction of s.152(1)(c) of the CCO was upheld. The comments of the Justices regarding the subtleties of Muslim law concerning a marriage that was held to be faulty but not void, and the validity of an ensuing rape charge,[33] were therefore not binding, but they clearly exemplified the immense difficulty of incorporating religious law[34].

In *Cativ* [35], another angle of the local circumstances was raised. The appellants, two brothers, had been convicted of rape[36] and sentenced to five years imprisonment. In the appeal they claimed that the purpose of the intercourse had not been physical, but to force the victim's father to consent to her marriage with one of them, necessary according to the Muslim local custom. The girl, a cousin of the appellants, resisted the intercourse, but she had been interested in marrying the appellant. The rape had served to establish one's possession. Marital rape in this case, as in the others, has been a part of an intricate web of issues: a woman's status as a male's possession, whether her father's or her husband's, family hierarchy, cultural differences. Implicitly, the English rule had in it an element of proprietary law too, behind a facade of contractual arrangement, in the inability of the wife to retract from her initial consent, the right of the husband of an immediate enforcement. The Muslim custom may be seen, then, as merely more overtly expressing the same ideology, the husband's right to his wife's body as a *right in rem*. This proprietary assertion of rights also conforms with the radical feminists analysis of rape, according to which a woman deserved protection as would any other harmed property, while "worthless" women, such as prostitutes, had not been entitled to this protection.[37] This view will be further discussed later.

Although it soon became clear that the victim and the appellant had not been married (as he argued), the court nevertheless referred to the English doctrine, J. Berenson joined J. Halevi's

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[32] *Al-Fakir*, op.cit. at p.220.

[33] Ibid. p.211 per (the then) Rep. of ChiefJustice President (Agranat).

[34] The authority to look into the religious law was given to the courts in s.35 of the Courts Law , 1957, if probing the incidental question was necessary for settling the matter.

[35] Cr.A. 354\64, *Cativ v. The Legal Adviser*, op.cit.

[36] CCO,1936, s.152(1)(a).

[37] Sebba, L. (1992),.at p.55.

opinion as had been expressed in *Al-Fakir* , regarding the doctrine as obsolete.[38] Berenson added that criminal and civil laws alike proposed to protect the wife's rights and status, even if abuse had been the norm among "certain ethnic groups or emigrants from certain countries". This broad declaration was not, again, binding, but was one reference to a phenomenon that would be denounced following the wider conception of gender equality.

Accordingly, Halevi's remarks, although obiter dicta, gained acclaim as a criticism of views prevailing in Israeli society, and raised hopes for an equality-oriented Israeli law.[39] Thus, Livneh, a supporter of the departure from the British marital rape exemption, logically following from the Supreme Court's dicta, argued that it would not be a break from penal law traditions but a break with family law traditions, which had already occured with the adoption by Israel society of the rule of equality (later expressed in the Women's Equal Rights Law, 1951).[40] While his contention may be sweeping, as the issue had been a constituent of criminal law, and penal law traditions, as shown, had been firmly established, Livneh correctly alluded to a connection between this subject and general social perceptions of women's roles.

A reluctance to admit this departure was however evident in the Supreme Court verdicts which attempted, through what may be seen as legal acrobatics, to modify the heavily criticised rule without actually overturning it.

Cohen v. The State of Israel

The first Supreme Court appeal specifically confronting marital rape was *Cohen v. The State of Israel.*[41] The appellant had been convicted of rape, and sentenced to three years imprisonment[42]. The court encouraged an appeal, undoubtedly in order to obtain a Supreme Court precedent on this issue, which until then had been commented on only as obiter, and as the required "unlawfulness" had not been changed by the recent 1977 Law.

Reviewing the English and the American situations (mentioning Livneh's critique), J. Bchor concluded that the doctrine would offend the conscience and human logic in an enlightened state[43], citing Halevi's words in *Al-Fakir*, and Berenson's in *Cativ*. The axiom of J. Bchor's majority's verdict was the interpretative rule that the legislator was deemed not to have wasted words, and the meaning of "unlawful" was held to concern personal law.

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[38] *Cativ v. The Legal Adviser*, op.cit. at p.139.

[39] Livneh,E. (1967), at p.416.

[40] Ibid., at p.422.

[41] Cr.A. 91/80, *Cohen v. The State of Israel*, 35[III]PD281.

[42] according to s.345 of the 1977 Penal Law.

[43] *Cohen v. The State of Israel op.cit.* at p.285.

J. Ben-Porat held a minority view, that contested a necessary connection between "unlawful" and personal law obligations. J. Ben-Porat raised the poignant point that most religious marriage ceremonies took place for lack of choice, civil marriages being unavailable in Israel. While civil marriages conducted abroad would be recognised by the Home Office, divorce would still be conducted by the religious court.[44] Hence, the application of this secular, criminal law would vary according to the applied religion, whose rules, the presumed basis for any right or obligation, would not have been necessarily observed by either the accused or the victim.

The English rule, although rightly criticised, at least had a territorial application, regardless of the involved religion[45] . Similarly, the often cited remarks of Justices Halevi and Berenson have seemingly indicated towards a generally applied provision, although, contrary to the English law, meaning a general prohibition.

However, the majority favouring J. Bchor's interpretation, the court had to deliberate for the first time the Jewish law, which had been the personal law of the involved therefore determined the matrimonial rights and duties. The Jewish law, as part of the valid legal material, did not require proving, as knowledge had been assumed. The Justices had nevertheless been submitted a report by Dr Rakover, the former Legal Advisor for Jewish law in the Ministry of Justice.[46]

Rakover maintained the existence of a Biblical duty on the husband to have intercourse with his wife. However, any authority for a parallel duty imposed on the wife was not found. Her duty stemmed from the marriage agreement and therefore could be stipulated, and several reasons for justifiable reluctance had been presented throughout the ages.[47] Whereas the origin of the wife's duty was the same as in the English rule, undertaken matrimonial obligations, the limits were different. It may be contended that the English legal perception of the matrimonial duties was one of proprietary obligations, while the Jewish law regarded it, more progressively, as contractual relations. An implied consent to coercive intercourse was not inferred. According to the authorities, unjustifiable refusal was punished by depriving the wife of her rights, or by forcing a divorce, but never by allowing coercive intercourse. Early Jewish sources specified a few reasons, among them the almost modern psychological reasoning, requiring that it would be done "with the happiness of both"[48] . Rakover also identified a superstitious argument, which may have been a persuasive means to enforce the prohibition, in the threat that a child resulting

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[44] This is one of the most undesirable outcomes of the mentioned exclusivity of religious courts regarding marriages and divorces and the religious political power.

[45] Shahar claimed that if the "unlawfulness" had been a reference to a law, it had been the English criminal law, and not the English family law, which had in any case been separate from religious rules, and had prescribed a very limited range of rights and duties, unlike the Jewish one. Shahar (1981) , at p.689.

[46] Later published as: Rakover,N. (1980).

[47] Ibid. at p.24.

[48] Ibid. at p.23, citing the R"AMBAM.

form such a rape would be deformed.[49] Sons being a supreme priority, this threat would have been at least as effective as criminal sanctions. Rakover concluded that the religious courts had always treated the imposing husband severely. One source even compared coercive intercourse to prostitution, which was forbidden, considered sinful.

The court adopted Rakover's opinion, J. Bchor commenting that additionally to the Jewish law, prohibition of marital rape was also consistent with the fundamental principle of the woman's dignity as a free person, not a captive subjected to her husband's mercy.[50]

Despite the enlightened attitude of the Jewish tradition, compared to the situation in countries where those fundamental principles had not been applied in the law, it should not be forgotten that the civil remedies available to the husband according to the Jewish law have been very severe and would harm the woman considerably. This was particularly true in times when the wife was always financially dependent on her husband. The financial sanction resulting from forced divorce could therefore be just as severe as a bodily harm. Furthermore, considering that the traditional Jewish law has presumed that a woman would prefer the status of being married at almost any cost, the option of divorce would not have been likely[51] .

The denunciation of marital rape is all the more surprising since the Jewish religion has emphasised the family, an essential feature since the book of "Genesis" and the emphatic precept directed at Adam to multiply. Moreover, the supreme interest has been that of the community, comprised of families, to which any individual interest would have had to be subjected[52]. It could have therefore been reasonably supposed that the end would justify the means in this case, especially when women's rights have not been of major importance, although the wife's dignity was mentioned in Rakover's review several times.

Although the outcome of *Cohen* was embraced, the interpretation would have meant that a different law would determine the matter when the involved parties were not Jewish. Further complications would rise in cases involving people to whom different personal laws applied, as following a mixed-religion civil marriage. A degree of confusion thus seems unavoidable, contradicting the elementary principle requiring the clarity of any criminal law provision.[53] In a country where the personal law of the majority has forbidden marital rape, letting certain defendants escape conviction, would be unjustifiable.

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[49] Ibid. at p.22. The cited authority gave the reason as "because she (the wife) said during the act that she was being raped".

[50] Cr.A. 91/80, *Cohen v. The State of Israel*, op.cit. at p.291.

[51] See Rosen-Zvi, A. (1988) , at p.112.

[52] Ibid. at p.118.

[53] The applicability of the principle in Israel was discussed in:Levy,Y. & Lederman,E.(1981) , at p.67.

Reliance on religious laws in order to obtain norms, when not absolutely necessary, especially concerning criminal law, is undesirable as a matter of principle. It may be regarded as coercion of a largely secular society by archaic laws, when reference to social changes would presumably have had similar results, just as the English law was shown to have developed from moral-social perceptions and not from religious ones. Even seemingly advanced religious concepts should not be entangled with the criminal law. Besides the theoretical reservations, the court's previous struggles with Muslim laws exemplified just how unnecessarily complex this merger of religious law and criminal law was. As only J. Ben-Porat, interpreting the term "unlawful" as meaningless[54], expressed this reservation, the other judgements were apparently ambiguous, protecting the autonomy of the Jewish wife, while at the same time possibly subjecting other individuals' rights to harm, without resorting to the obviously needed advise to the legislator to change this vague term.

In *Zektzer* , J.Vitkon , in a minority, alerted to the dangers of "arriving from the 'rule of law' to the 'rule of interpretation', open to the consideration of the exponent of the law".[55] The Israeli court's leaning towards creative interpretation has featured here, and*Cohen* seems a prime example, however beneficial its implication.

The appellant's attempt to be granted a further hearing was dismissed on the grounds that there was not a reasonable chance for repeal of the conviction, as this had been correct even without the discussed interpretation.[56] The then Rep. of Chief Justice President of the Supreme Court, H.Cohen, agreed with Ben-Porat's position, that "unlawful" was a meaningless expression, therefore personal law provisions were not relevant.[57]

H. Cohen had been the chairman of the committee which advised the new version of the CCO, that suggested replacing "unlawfully" with "who is not his wife". This was promptly corrected and the law returned to its original wording.[58] He explained in *Cohen* that their intention had been to uncover the truth behind the legal term, in order to lead the legislator to change it.[59] He therefore considered that by reinstating "unlawfully", the CLJ Committee revealed that it had not

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[54] Cr.A. 91/80, *Cohen v. The State of Israel*, op.cit. at p.294.

[55] F. H.7/78, *Zektzer v. The State of Israel*, 32[II] PD828,at p.832.

[56] F. H.37/80, *Cohen v. The State of Israel*, 35[I] PD371

[57] Ibid. at p.373.

[58] The amendment was passed in the Knesset on 22 March 1978, as one of several amendments made according to the authority given under s.16(8) of the Law and Government Procedures Ordinance,1948.

[59] Shahar mentioned a similar attempt of the Legal Adviser to Palestine, in 1926, to change "unlawfully" into "otherwise than in marriage", in the first version of the provision. It generated anger among the English advisers who adhered to the wording strictly. Shahar,Y. (1981) , at p.675. The same purpose, presenting the rule in its harshest and clearest form, may have led the two attempts.

considered a marital rape to be the husband's privilege.[60] (A doubtful explanation, since if the Committee had the alleged profound intentions in changing the wording of the law, it might have abolished the term "unlawful" altogether, had it not been interested in maintaining a certain meaning to it.[61] Furthermore, the first, creative, interpretation was apparently simply beyond the committee's authority.)

Apart from the insight into the legislative process offered by Cohen, the refusal of a further hearing resulted in a somewhat unclear situation in the Supreme Court , as his consent to Ben-Porat's judgement implied that resolution of future cases could depend upon the particular justices allocated, each supporting a different legal strategy to achieve the coveted solution. In a case involving non-Jewish persons, it might have had a significant effect, hardly a welcome situation. The denial of a further hearing was predictably criticised[62], especially as the court had encouraged the defendant not to plead guilty, in order to ascertain the rule.

The whole issue presented, then, a fundamental contradiction between the rule applied to Jewish defendants, ostensibly deeply aware of women's rights, against the very use of personal law, abandoned in most western countries[63], resulting in a possible discrimination in a particularly grave area of the criminal law. It may be reasonably argued that policy considerations should have led to the adoption of an interpretation that would not cause discrepancies, and which was also plausible.

Penal Law Amendments

As a law based on archaic English principles was highly unsuitable to Israel towards the end of the 20th century, as exemplified by the foregoing review, a reform was expected. The dilemmas regarding the relationships between Mandatory legislation and the new Israeli version, and those between personal law and criminal law, were awaiting a legislative answer.

Penal Law (Amendment no.14)1980- Bill

The first major reform, acknowledging the unsuitability of the Mandatory provision to the "current reality ", after contemplating other western countries' laws, was suggested in 1980[64], concurrently with the public interest following *Cohen* . The Bill adopted the main

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[60] *Cohen v. The State of Israel*, op.cit. at p.377.

[61] Shahar,Y.(1981), at p.655.

[62] Ibid. at p.650.

[63] See Shava,M. (3rd ed.1991)vol1, at p.43.

[64] Penal Law (Amendment no.14)1980.

recommendations of the Joint Committee (chaired by S. Aloni[65]), that had submitted its recommendations about amending rape laws in 1978.

As numerous new definitions and classifications were introduced, including a few aggravating circumstances, among them a young age of the victim, the proposal and the following law will not be reviewed in detail. Suffice to note that using force has remained an element of the rape offence, although it would have included "an abuse of a situation which would prevent resistance" as well as threats directed at another person, the latter a new expansion[66] . Central to all newly-classified offences was an increase of maximum punishments.

The suggested definition of rape omitted the term "unlawfully", aiming to deprive any husband of the exemption of marriage. This omission intended to express the principle that violence should not be tolerated, not even within the family, and that a woman was not her husband's captive that may be sexually used against her will[67], endorsing the judicial expression, often used in the reviewed authorities. Similarly, this exemption would not be available regarding the newly formulated offence of sexual assault.[68]

The proposal was acclaimed as "a fine example of the influence of an enlightened Jewish tradition on the territorial legislation"[69] , by Shahar, whose comprehensive critique listed further reasons for the abolition of the husband's immunity, among them the objection of modern legal systems to self-remedies, particularly violent ones, as they could indicate faulty official means of enforcement[70], and the complete detachment from the classification of the wife (along with servants and slaves[71]) as chattels[72] . Abolition also accorded with the modern law's wish to eradicate any manifestations of legitimacy for a person to irrevocably subject his body to another person[73] , obviously in stark contradiction to the doctrine of absolute consent used in this context. These arguments will be elaborated regarding the English law.

A married couple was nevertheless positively exempted from the offences of unlawful sexual

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[65] Aloni's contribution to the fight for women's rights and against religious coercion was mentioned regarding prostitution, while the Committee was mentioned regarding the abolition of the requirement of corroboration concerning rape, later adopted regarding prostitution.

[66] Penal Law (Amendment no.14)1980, .s.1.

[67] Ibid. at p.389.

[68] Ibid. at p.391. Proposed s.348.

[69] Shahar,Y. (1981) , at p. 651.

[70] Ibid. at p.659. But Shahar also recognised the option of interpreting the rape as a right in itself, and not as a remedy ancillary to the right to have intercourse.

[71] Mill's comparison of women and slaves will be discussed.

[72] Shahar,Y. (1981), at p.661.

[73] Ibid. at p.663.

relationship[74] and unlawful sexual acts[75] where no force was used, although consent may still have been impaired. Considering the invasion of privacy by the other provisions, this scope for private acts, apparently relatively harmless, appears a necessary social realism.

Penal Law (Amendment no.26)1986[76] - Bill

As the 1980 proposal had not been adopted, the issue was evoked six years later. Since the Bills were essentially similar, discussion will be brief. The abolition of the term "unlawful" in relation to rape and coercive indecent acts using force, based on the arguments used in the 1980 Bill[77] , was again one of several changes, pursuing a harsher policy. That was expressed by relaxing the terms of the offence in order to cover more cases besides the obvious ones, while increasing the maximum punishments. The element of using force has remained, including the added possibility of threatening another person besides the victim herself.

The changing times were evident in the suggestion to abolish "Fraudulent pretence of marriage"[78], an adoption of the CCO's archaic provision, carrying a severe maximum punishment of ten years imprisonment, reduced by the Israeli legislator to seven. The Bill reasonably suggested to leave it for the general Penal Law provisions regarding fraud[79] . The surprisingly enduring retention of this provision may indicate the special social position of the family, especially of the matrimonial sexual intercourse, as the core of the offence had been the persuasion to "co-habit or have sexual intercourse with him". Allocating it a special provision had definitely reflected a moral stand that distinguished it from other forms of deception, regarding it more severely. Thus, including it under the general provisions of the criminal law would have been consistent with the idea of unification of offences where only invalid moral and social perceptions had justified separation, as contended regarding prostitution.

It should be noted that in 1982, the requirement of corroboration was abolished[80], as discussed earlier. Regarding prostitution a lesser demand was introduced, to find in the evidence material something to sustain the woman's evidence.[81] Compared to other criminal offences, a special evidential requirement still exists regarding rape, too. The court should explain what made it rely on the sole evidence of the victim. It does imply that sexual offences still evoke an emotional reaction, even for the legislator, different from other offences.

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[74] Penal Law (Amendment no.14)1980, at p.390, proposed s.347.

[75] Ibid. at p.391, proposed s.349.

[76] Penal Law (Amendment no.26)1986.

[77] Ibid. Explanations to the proposed s.345, p.303.Explanations to the proposed s.354, p.306.

[78] Penal Law, 1977, s.359.

[79] Ibid, p.308.

[80] S.54a(b) of the Evidence Ordinance [New Version]1971, amended in 1982.

[81] Evidence Ordinance Amendment Law (no 6), 1982.

Penal Law (Amendment no.22)1988[82]

This eventual amendment to the Penal Law has essentially followed the guidelines of the 1986 Bill, although the wording was modified. The increased penalties, the broader definition of "using force", and, finally, the omission of the term "unlawfully", have remained.

Minors

The offence of intercourse with a minor married to the perpetrator would have been abolished by the 1980 and 1986 Bills[83], and has been abolished in 1988, to reconcile the criminal law with the civil law, which provided that a court may permit the marriage of a pregnant minor under the age of 16[84]. The husband in such a case should obviously not be prosecuted.

The Bills' concern for minors was further expressed in new severer offences confronting sexual intercourse with minors, assuming the minor's consent to be intrinsically impaired, prescribing a punishment almost equal to that for rape[85].

The 1988 Amendment espoused the importance attached to the protection of minors in s.1(3), adding to the scope of the rape offence the case of a girl under the age of fourteen, regardless of her consent, while previously it would have amounted to unlawful intercourse with a minor. Minors under the age of sixteen, and those under the age of 18 when relationship of dependence or control existed, have been protected by the offence of consensual unlawful intercourse, punishable with five years imprisonment, consistently with the approach which regards a minor's consent as invalid. A defence has however been introduced regarding consensual acts where the age gap between appellant and victim was not bigger than two years[86]. The mitigation expressed social realism, not intervening unnecessarily with what may seems an inevitable part of a natural process.

The Bills had not introduced an age limit where the victim had been the offender's offspring, or his wife's. The Amendment, however, set the age limit at 21, and reduced maximum penalty to seven years imprisonment. This mitigation could arguably imply some sensibility rather than mere vindictiveness, as the punishment was still severe and the age limit higher, compared to other offences, expressing the likelihood that consent had been achieved by exploitation of an unbalanced relationship. The prominence of protection of the youth will be elaborated.

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[82] Penal Law (Amendment no.22)1988.

[83] S. 349.

[84] The Age of Marriage Law, 1950, s.5.

[85] Penal Law (Amendment no.26)1986, op.cit.Explanations to the proposed s.346, p.304.

[86] Ibid. s.353.

Penal Law (Amendment no.30)1990[87] - Marital rape as an aspect of domestic sexual offences and violence

The offence of having consensual intercourse with one's descendant[88] has been abolished. Despite suggestions to add aggravating circumstances to existing provisions, the final formulation contained a whole new offence, dealing specifically with sexual offences within the family, and aimed mainly at protecting minors[89] , broadening the legal scope to victims who were "members of the family", not only the offender's children or his wife's. The assumed severity of the offences has been expressed in the increased penalties, compared to similar offences that do not involve family members. Rape of a member of the family who is a minor would be punishable with twenty years imprisonment, while the parallel offence had carried a maximum punishment of sixteen years, without aggravating circumstances. Moreover, unlawful intercourse or sodomy committed with a person between the ages of fourteen and twenty one would be punishable with sixteen years imprisonment[90] . This provision extended the limits of the offences of unlawful intercourse and sodomy, raising the age limit beyond the age of consent and increasing the punishment. Thus, the law, prompted by the lobby acting for children's rights and protection[91], has broadened the group of "the weak", perceived as deserving protection from exploitation, to an unusual extent. The debated theoretical justification of paternalistic provisions has been discussed previously, including the more accepting approach of G. Dworkin[92] , and whereas his criteria may have been better fulfilled here than regarding prostitution, since the harm may be greater and more tangible, justification for such a harsh legal treatment nevertheless remains questionable regarding adult victims.

"A member of the family" has been widely defined, including a parent, a partner of a parent, and other forms of relationship, whether blood relations or by marriage, extending the scope of the offence beyond the Bill's proposal[93] . Although "a spouse" has not been included in the definition, these cases would have probably been the minority of marital rape cases. Furthermore, as this major change of the law has presumably indicated the seriousness attached by the legislator to all sexual offences within the family, marital rape could have been similarly regarded even without a special provision. The promptness with which this amendment had been accepted, compared to legal efforts that have taken years of deliberations, often without legislative results, is another indicator of the general atmosphere and the urgency felt. Similarly,

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[87] Penal Law (Amendment no.30)1990.

[88] 1977 Penal law, s.346 (b).

[89] Ibid. s. 351.

[90] Ibid. s.351(b).

[91] Sebba,L.(1992), at p.69.

[92] In Dworkin,G. "Paternalism".

[93] Penal Law (Amendment no.33) Bill1990. The Bill restricted the relationship to the closest: a parent, a parent's partner, grandparents, siblings.

domestic violence offences had been reviewed by the Karp Committee in 1986[94] and its recommendations (submitted in 1989) were implemented in The Law for Prevention of Violence Within the Family, 1991.

While these provisions are not directly connected to marital rape, they do represent a tendency. The balance appears to have changed, from perceiving the family as a separate social unit where otherwise unlawful acts may be committed, to realisation that those acts could be particularly severe and serious. If fifteen years ago the autonomy of the family, and the undamaged marriage as a social value, could justify leaving the marital situation outside the boundaries of the criminal law[95], this has definitely changed. Presenting the family as an autonomous system was essentially an attempt to claim either that the state had no right for intervention or that the price of intervention would have been greater than the gain. However, as Shahar rightly argued[96] , this was hardly the case, since marital rape has definitely not been an example of victimless conduct or one that amounts to self-harm only, compared to similar arguments that were made, for example, regarding the doubtfully harmful prostitution.

Consequently, coercive matrimonial intercourse could be classified among unjustifiably criminalised conducts, even according to vehement proponents of individual rights and autonomy such as Hart or Mill.

Paradoxically, similar observations concerning the delicate fabric of the complex relationships involved, have served both sides. Whereas previously the patriarchal superiority had given the head of the family privileges, now it entitles the other family members to a special protection, acknowledging the easiness with which the relationship may be abused, the courage needed to break the silence and complain. A clearer example of shifting social perceptions, followed by the legal borders, is unlikely. The theoretical implications of this invasion of privacy will be discussed later, including feminist implications. Thus, Shahar, without a commitment to feminism, hinted at the position of women when commenting that a group of potential victims existed, women who had been subjected to enduring relationship based on their inferiority[97], the same inferiority that had led to the marital exemption.

The earlier criminalisation of marital rape can thus be interpreted as a first step in disentangling

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[94] "Report of the Committee of investigation, prosecution and trial policy in violent offences within the family: Violence between spouses" (1989)Raday F., Shalev C., Liban-Kooby M. (ed.)(1995, from p.280. (hereinafter refered to as 'the Karp Committee')

[95] See Australian and American sources in : Shahar,Y.(1981) , at p.665.

[96] Ibid. at p.667. Shahar found one Australian source that supported a legal unity of husband and wife, a doctrine that would have justified this stance. However, as the view has been largely relinquished in the 20th century, discussing it seems irrelevant.

[97] Ibid. at p.673.

the complex familial relationship, subjecting them to an inspection by the usual standards, bringing them to the attention of the authorities where needed, in order to protect and prevent the too-frequent cases of solving problems by greater violence. This is still very much an utopia. Complaints have not always been taken seriously. Meanwhile, sadly, incidents where a family member kills another after years of untreated abuse still occur, and the debated criminal implications of this situation as a defence for murder will be discussed later. Rapists, including those who hurt members of their own family, still seem to get lenient sentences[98] . The general recoil from complaining about sex offences apparently still exists, although there has not been an agreed estimate of the extent of unreported cases.[99] If the mentioned research about the educational role of the criminal role has been correct, this may change in time, following the other mentioned changes.

Although the Bill attributed the sudden interest to the growing number of disclosed cases of this "acute phenomenon which has abused fundamental moral rules"[100], the number of cases has not presumably grown so much as the number of reported or detected cases, due to a recent openness and awareness. This diminishing immunity of the family as linked to other social factors, the lessening importance of the family unit as a necessary social institution, along with greater readiness to discuss issues which had been considered taboo, as contributing to legislative changes, and the complexity ensuing from its sustained social power, will be discussed elaborately in the next chapter, as the trend has been similar in England.

During the discussions about prostitution it was sometimes argued that liberalism, or the so-called "Permissive Era"[101] , had led to diminished moral standards and to undesirable social phenomena. The venture of the criminal law into the previously shielded realm of family life could support the opposite stand, the merits of this liberalism, although, as said, the complexity of the political map will be discussed later. Though one may argue that the following broken marriages and disbanded families are a high price to pay, it is quite safe to assume that only the most extreme cases will be brought to the authorities' attention, those where the harm to the individuals would justify the grave results. (One cautionary and particularly extreme example of ridiculous results reached by unnecessary zealous invasion into the marital privacy is the English case of *Wilson*[102] , where minor bodily harm had been consensually inflicted and curiously prosecuted.)

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[98] Suggestions to set minimum sentences following public outrage will be discussed.

[99] Sebba, L. (1992).

[100] Penal Law (Amendment no.33)1990.

[101] Newburn, T.(1992).

[102] *R v Wilson*, [1997] QB 47.The case was distinguished from *R v Brown* [1994] 1 AC 212, on the ground that public policy and public interest did not demand the sanctioning of the appellants behaviour, as the harm had been minimal.

In the long period that marital rape has been a recognised offence in Israel, a minute number of cases has reached the courts. One should not forget that only as late as 1979 the first principle judicial discussion took place, while the possibility, at least theoretically, had existed years before. Whereas this may be interpreted as resulting from a social or legal fault, which still attached a stigma to rape victims, especially in the familial sphere, and did not encourage complaints, it may adversely show that some intrinsic, perhaps natural, curbs have existed too. Thus, fears about the offence being abused as a weapon in divorce cases have proved to be unfounded, even though the corroboration requirement in rape cases has been reduced, arguably facilitating false claims. The stigma on sexual offences, often criticised as a hindrance to justice, has probably functioned here as a filter, and while more cases should have probably been treated, those who have been exemplify just how important existence of this offence is. As Shahar commented, a matrimonial crisis may lead to false allegations, but it can just as well incite real violence.[103] When Shahar wrote his article, corroboration was still required[104] , and he used it as a partial answer to those apprehensive of false allegations. However, the abolition of the requirement has not been followed by a spate of cases, and Shahar himself insisted that procedural difficulties should not dictate the substantive law, a point made here earlier regarding prostitution offences and excuses about difficulties of obtaining evidence.

Sentencing and Policy Considerations

Rape, judging by the attached maximum sentence, has been one of the most serious offences in the criminal code. Surveys have confirmed that the public has perceived similarly.[105] Has marital rape been considered as serious? Or, can it be said, inferring from the actual sentences, that it is still not considered " a real rape" but a mitigated form of it[106] ? Has the tendency towards severer punishments (although not necessarily a progressive one), expressed in the reviewed amendments, been expressed also in court?

It is a particularly complicated issue, as there has not been a comprehensive research into sentencing patterns in sexual offences or rape cases, let alone the few marital rape cases. Hence, a comparison is rather impossible. Therefore, certain general observations about sentnecing will be made, and the few verdicts delivered by the Supreme Court will be looked at.

It should be noted that MK Yael Dayan has been pursuing a proposal to impose minimum imprisonment sentences in all sexual offences, and a similar proposal was presented by MK

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[103] Shahar ,(1981) , at p.672.

[104] The 1980 amendment was referred to earlier regarding prostitution offences, and the reasons behind this change were reviewed, as well as feminist critique.

[105] Sebba,L. (1992) , at p.90.

[106] The distinction between the two will be extensively discussed in the next chapter.

D.Zuker. Although it is too early to assess their chances of success, the allure of the initiative is clear, especially considering the growing criticism against lenient[107], even ridiculous sentences. Several demonstrations (organised by women's organisations) against lenient sentences have apparently driven the Minister of Justice to announce his intention to impose minimum sentences in rape cases[108], a surprising announcement, as only two weeks before Mr Libai had supported the Chief Justice, A. Barak, in his emphatic dissent, based on apprehension of subsequent similar public demands concerning other offences[109]. Barak has argued that "sentences should reflect history and not hysteria"[110] , a view that for all its persuasive legal power has seemingly been abandoned by the Minister. Several judges had already expressed reservations about being restricted by minimum sentences in the past[111], along with MK Mrs.S. Aloni, who stressed the importance of judicial discretion.

This situation raises again questions of justifying hasty legislative amendments following massive public pressure, especially when the matter would have been properly discussed according to the Ministry of Justice's agenda and in the meantime there has been a solution (even if not ideal) in the power of the Supreme Court to modify sentences on appeal[112], facilitating the establishment of a consistent severe sentencing policy while still allowing for the occasional exception. For this account, the significance is in the sudden moral panic about sentencing and the ensuing questionable legal measures that may be taken.

On the other hand, in cases involving a husband, usually still the main provider, there has been an intrinsic and particular difficulty, as a long prison sentence may affect the family profoundly, including the victim herself. Even feminists, generally adamant in this context, have not always supported very harsh sentences.[113] In Israel, as will be seen, various reasons have ostensibly justified minor sentences. Has the legal reform been symbolic rather than substantive?[114]

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[107] In 1992, for example, well over 60% of the convicted were sentenced to an imprisonment shorter than two years: Shachar,A.(1993) , at p.198.

[108] Tzimuki, T. (1996) .

[109] Indeed, in a proposal brought before the Ministry of Justice by Prof. Feller, it has been suggested that all violence offences should include minimum sentences, setting a social norm of seriousness of offence just as maximum sentences do. The proposal is still under consideration.

[110] Tzimuki, T., (1996).

[111] Sebba,L. (1971).

[112] An internal survey of the Public Prosecution that leaked to the press had found that an amazing 60% of the appeals brought by the Prosecution in the 4 months period prior to the survey considered unreasonable lenient sentences imposed on sex offenders that had hurt young or otherwise vulnerable. Goldberg,M. Y(1996): "The Supreme Court gets tough".

[113] Sebba,L. (1992) at p.82.

[114] Ibid., at p.100 Sebba cites American research that found that that had been the case in rape reforms in several American states.

In *Cativ* [115] , despite J. Berenson's expansive declaration regarding the wife's rights, and his understanding that deterrent sentences should usually be imposed for rape, the Justice nevertheless took the local circumstances into account as mitigating, and reduced the sentence to three years imprisonment, supported by J. Zusman.[116] (It should be remembered that the offender and his victim had not been married.) As with the Arab custom of blood feud, which generated a debate, could not it be argued that lenient sentences would have encouraged undesirable customs? The educational role of the criminal law has been mentioned occasionally. Had the justices been so interested in women's rights as their remarks about the English exemption suggested, surely they would not have wished to encourage the view of the woman's body as her husband's or her father's possession. However, this view would have been supported by lenient sentences for rape under such circumstances. A certain discrepancy existed between the liberal declarations and the arguably lenient sentence.

J. Halevi, dissenting, was of the opinion that a brutal rape was not less serious only because it had not been done for physical satisfaction.[117] Halevi's view, which weighs differently the cultural (and perhaps moral) factors, is more consistent with modern views of rape as an expression of aggression, and is more compatible with the liberal approach.

In *Cohen* [118] , imprisonment was reduced on appeal to a year and a half, suspending the rest. Besides the mitigating personal circumstances, the court mentioned the fact that this offence had been uncommon, that it was the first time a Jewish husband had been convicted of it. Furthermore, the court distinguished this case, where the rape had been a part of an ongoing pre-divorce quarrel from "the problem of the wife beaten by her husband, who abused her using her physical frailty, in order to express his anger, without any provocation on her side."[119] This reasoning seems curious. Even if the complaint had been made in order to support the wife's divorce case, it was not fictitious. Knowing that most rape cases actually occure between people who knew each other, and do not conform to the stereotype of the rape by a stranger[120], the court could have been expected to attribute greater seriousness to this particular variation of the offence, especially as two separate violent incidents had been proved. The court appears, then, not to have taken it just as seriously as other cases.

However, as Sebba found (not conclusively) that the "typical" rapist had been sentenced to four years imprisonment[121], sentencing leniency has not apparently been limited to marital rape.

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[115] Cr.A. 354\64, *Cativ v. The Legal Adviser*, op.cit.

[116] Ibid. at p.139.

[117] Ibid. at p.140.

[118] Cr.A. 91/80, *Cohen v. The State of Israel*, op.cit.

[119] Ibid. at p.292.

[120] See: Shahar,Y. " (1989).

[121] Sebba,L.(1992), at p.86.

Sentencing patterns regarding rape have indeed been controversial for a long time.

In another context, regarding the question of "the negligent rapist" and the point of view by which consent should be determined, Shahar considered that a change of standards in such a sensitive and complex area as man-woman relationship in a modern pluralist society, could not be achieved through a subtle judicial message.[122] The same is true here. Although the judges' message concerning the undesirability of the exemption has been clear enough, the possible discrimination between religions following the interpretation, coupled with the lenient sentences, could well lead to ambiguity. A stronger and unequivocal message was needed. The reviewed amendments to the law could have provided it, but even they will not suffice if sentencing policy remains lenient.

Lately, concerning sexual offences within the family, the vast public pressure may have succeeded, at least temporarily. The Supreme Court has directed the lower authorities to impose severer penalties regarding familial violence and rape. Following this precedent, the maximum sentence of twenty years imprisonment was imposed, for the first time, on a father who was convicted of raping two of his daughters, committing indecent acts against another, and assaulting his son. The judge recognised the need to convey in the sentence the clear message of a deep societal denunciation of the acts. The wife's evidence, according to the press coverage, demonstrated the point made here earlier, of the sexual attack as just a part of enduring violence.[123] One may hope, then, that the same rationale would lead the judges in future cases of marital rape also, especially as it is too early to assess whether this is a reform or a passing trend as a response to momentary public pressure.[124]

However, as mentioned regarding prostitution, it is the law enforcement that has had the greater effect on crime rates, therefore the factors mentioned here that would contribute to an effective enforcement, particularly changes that would lead to more cases being reported, are the most important to pursue.

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[122] Shahar,Y. (1989).. at p.102.

[123] Reinfeld,M. , *Ha'aretz*, 21 August 1995.

[124] Mr. Y.Kadman, the director of the National Council for Children's Safety, who has campaigned for this severer sentencing relentlessly, has expressed similar cautious satisfaction in : "Hope for severer penalties", *Yediot Aharonot*, 8 September 1995.

Feminism, rape and domestic violence - Patriarchal attitudes and religion

A possible major influence on the legal situation has been the rise of feminism. While it may have not been directly responsible for the legal changes, it has certainly contributed indirectly, even by just raising women's awareness of their basic rights, including those relating to their bodies. The number of legal critiques concerning the position of women in Israeli society generally, and the issues of rape and violence particularly, has grown steadily .

Ostensibly, women's status has been respected and equality sought from the outset of Israeli society and its legal system. As seen, the protective element of the criminal law, along with the importance of the wife's free will, were stressed by the Supreme Court in the 1960's, in *Cativ* and *El-Fakir*[125]. Furthermore, the foundations of the Israeli legal system seem to have promised equality, in the expressed rejection of gender discrimination in the Declaration of Independence[126] and in the legislation of equality in employment in 1951[127]. Another relevant law in women's struggle has been the Basic Law: a Person's Dignity and Freedom[128] , which has a stronger constitutional value and enshrined the rights of privacy, and respect of life, body and dignity. The constitution of a legal system at the second half of the 20th Century could in itself suggest a greater social tolerance based on modern perceptions. As women have been soldiers (albeit in restricted positions) and labourers, their status could be assumed to be better than that of their counterparts in other countries. However, the actual legal and social position of women was still inadequate[129] and the growing feminist awareness and legal criticism could be compared to the English one, despite the different background.

As in England, feminism's crucial importance is in providing a theoretical framework for phenomena that would otherwise be regarded as fragmented, unrelated, and therefore trivialised. The fundamental connection pointed out by feminists between criminal victimisation

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[125] *Cativ v. The Legal Adviser*, op.cit. *Al-Fakir v. The Legal Adviser*, op.cit.

[126] The Declaration of Independence, 1948, S.2. Without elaborating about constitutional problems, it should be noted that the Declaration has not been awarded a status of a legal - constitutional rule that would have enabled declaring contradicting laws as void: Rubinstein, A. (1980), from p.28. However, the document was recognised by the Supreme Court as a fundamental declaration of equality that bound the Israeli law: B'gz 153/87, *Shakdiel v. The Minister of Religions* 32[II]PD221, at least in case of doubt an interpretation supporting equality would rule.

[127] The mentioned Women's Equal Rights Law, 1951. This law, too, has not been too influential as it could be overturned by subsequent laws. The way to prevent it would have been to award it the position of a "basic law", and with it a constitutional power. See Raday,F.(1982) , at p.177.

[128] See s.2 and s.7(a). The Law, however, was criticised for not establishing expressly the fundamental right of equality: Raday,F. (1994) , at 254.

[129] e.g. Raday concluded that regarding employment law the legal system generally did not deal with discrimination satisfactorily: Raday,F.(1982) , at p.203.

of women and power inequalities in society may not have had English feminism's endurance, but it appears to have become more prevalent[130] . Furthermore, the parallel development of social awareness of domestic violence (and rape) ever since the 1970's[131] is quite striking. As the similarities are discussed in the specific contexts, and many of the Israeli writers have naturally referred to English ones[132], the unique influential local characteristics only will be assessed here.

F. Raday, a prominent figure in the analysis of women's legal status in Israel, has suggested that the features of the Israeli system have led to a complex picture of women's position[133], often contradicting the "myth of equality" created by women's involvement in politics, economy and employment. Explaining the myth, Raday used a significant distinction, between mere presence of women (in all those processes) and ruling power[134], or rather, lack of it, reminiscent of the English feminist analysis of the notion of power in society that has subsisted throughout this study. Accordingly, in this context, it is the connection between power and legal reform that has been described, as norms adopted by the legal system have changed with the changing balance of power in society.

Has this intricate situation been expressed in the criminal law? It could be assumed, and indeed it has been in this account, that in morally sensitive spheres women's position will be reflected, if only covertly. The volume of feminist legal work is rather slender, and most of it, understandably, like Raday's work, has concentrated on discrimination, employment law[135] and women's legal rights, or on the classic examples of women's victimisation. Attention has not necessarily been given to the more controversial gender roles, as regarding prostitution[136] . The explanation offered, concerning the unattractiveness of prostitution to English feminism, would be even more relevant to a country in which feminist tradition is not as secure and would therefore be even less inclined to encounter dubious issues.

One interesting insight of the Karp Committee concerned the factors, peculiar to Israel, that it

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[130] e.g. Shachar,A.(1993) . Shachar has linked the treatment of sexual offences to the characteristics of gender inequality.

[131] See Raday,F. (1994) , at p.280, although the legislative culmination of this awareness arrived only in 1991 with The Law for Prevention of Violence Within the Family 1991, op.cit.

[132] Raday, for example, referred favourably in her account of violence against women (in:Raday,F. (1994),at p.274) to Temkin's and MacKinnon's work, both mentioned here.

[133] Ibid.

[134] Ibid. at p.248.

[135] A consequence of the fact that the State of Israel was founded on Socialist ideology, therefore women's labour has ostensibly been accepted, but nevertheless not equally appreciated. Furthermore, note that in many religious households, the woman work while her husband studies, and he still is considered the undisputed head of the family.

[136] As seen, the early rejection of the marital rape exemption did not necessitate a struggle in this particular area.

considered to have effected violence in the family[137] . These factors include: (1) religious and origin-culture values (encouraging the wife's dependency on her husband), (2) the constant threat of war (which has encouraged male culture[138] and a general acceptance of violence), (3) the connection between a reality of war and religious values (emphasising the importance of the family and the wife's responsibility for it) and (4) family law that incorporates religious law, therefore complicating an unpleasant situation, and may hence cultivate violence. The Committee thus effectively suggested the existence of a social norm condoning violence. The underlying masculinity and patriarchal ideology suggest a particular leniency towards violence against women that necessitate feminist comments. Although these factors are undoubtedly sociologically accurate, their impact on the legal justice system, especially its more professional constituents, less susceptible to public pressure, the judiciary, should be reviewed separately.

Two characteristics have been repeatedly acknowledged here. These are the socially prevailing Patriarchal culture[139], likely to have affected the legal system, presumably in a hidden fashion, and the issue of gender-biased religious law, competing with State-created law in the family law area. These two factors have been at the core of feminist critiques.

Patriarchal attitudes (including those stemming from religious beliefs) had unquestionably affected, in the reviewed cases, the defendants, whose perceptions of gender roles and submission of women were addressed in the verdicts. However, they could have affected the criminal justice agencies just as well, in more subtle ways, less easily detected. One example is given in Avni's review of police's attitude to domestic violence, which suggested that police's unsatisfactory reaction could be explained by the patriarchal views held by a considerable number of policemen, that were also the basis of the battering man's behaviour[140]. Although Avni herself did not draw general conclusions from this finding, the link to feminist theories, concerning the masculinity of the legal system and its ideology, is clear. Moral judgment of women is made according to Patriarchal notions in all stages of the system, from criminalisation to enforcement.

The use of Jewish law to abolish the marital rape exemption was previously criticised as an example of using an undesirable method, expressing religious norms through the criminal law, to reach a desirable aim, leading to confusing results. On a more general level, though, severe criticism has been aimed at the legal authority of Jewish law and the Rabinical Courts

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[137] The Karp Committee Report, 1989, Ch.B s.5.

[138] For an analysis of the army as a strengthening agent of Paternalistic attitudes towards women see: Raday,F. (1994) , at p.248.

[139] Note the Patriarchal culture highlighted in the cases of *Cativ* and *Al-Fakir*. The defendants there were Muslims and Bedouins. However, such attitudes can be found among other ethnic groups in a culturally diverse state such as Israel, where over half the population originated from Arab countries, and there appears to be a current problem of domestic violence among Russian emigrants.

[140] Avni,N.(1990), at p.184.

concerning family law[141], which has been regarded as a hindrance to equality, creating a discrepancy with the otherwise modern legal system[142] . It may be added that this situation has contradicted the very notion of Democracy[143] . The autonomy of women, fundamental to the feminist theory, has been deeply affected. Even those arguing that Jewish law has not been as demeaning towards women as argued, have nevertheless conceded that in matrimonial matters women's position has been inferior[144] . Furthermore, the changing status of women has been a problem for the relationship between religion and reality[145] . Raday argued that consequently of these conflicting foundations of the legal system, a dichotomy of the woman's legal status exists[146], therefore a substantive change could only be achieved through abolition of the religious monopoly in matrimonial matters[147] . This undeniably desirable situation is hardly realistic in the current political climate. A disapproval of incorporation of religious norms into the criminal law, an even less likely location for them, could be easily inferred. The immense importance of changing the basic social perceptions, whether by legal influence or other means, has been emphasised regarding English feminism. In Israel, these moral perceptions have gained an official status by the authority given to the religious law.

Although the existence of this anachronistic system has clearly been enormously detrimental to women[148] , could it be assumed that at least in the criminal law area this discrepancy has not been as significant, and that religious values have not filtered through to legislation and court's decisions? As done regarding English law, the criminal provisions themselves can be analysed to disclose the social norms behind the offending conduct, the law and its operation. Raday suggested that only a profound analysis of the legal system could reveal whether the criminal provisions seemingly protecting women were based on respect of women's body and dignity, or on ulterior motives[149] . One conclusion from this study is that the dichotomy in the legal treatment of domestic violence or sexual offences, of the public and the private, has not been

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[141] This issue was elaborated in the context of religious attitudes towards prostitution.

[142] A legal evaluation that severly criticised this paradox is (although concentrating onemployment law): Raday,F. (1982) . In Raday,F.(1994), from p.268, the author analysed the patriarchal characteristics of religious law, the asymmetry between women's and men's rights in divorce proceedings.

[143] One of the less democratic aspects is that women can not be judges in Rabbinical Courts, excluding them from taking part in decisions, an expression of bias.

[144] Rosen-Zvi, A. (1988), from p.130. According to Rosen-Zvi, women's status in the Jewish law has slowly changed with the changing social conditions, in a similar process to the legal one as described here.

[145] See Rosen-Zvi, A. (1990) , at 185.

[146] Raday,F. ,(1982) , at p.173.

[147] Raday,F. ,(1994) , at p.269.

[148] e.g. In a recent case the Rabbinical Court allowed a husband to take a second wife, when the first refused to accept a divorce, arguing the court's bias against her claims, including allegations of violence. Reinfeld,M. , 20 August 1995. The socio-economic implications of such decisions can hardly be over-estimated.

[149] Raday,F. ,(1994) , at p. 275.

peculiar to Israel. A further similarity is observed in the still influential role of family values in legal considerations, which may have been derived, at least in Israel, from religious outlook. The comparison with the English predicament will show similarly ambiguous attitudes towards women and family. The main difference is the official position of these attitudes in the Israeli system, at least in one legal area, due to the religious contents[150]. The Basic Law: a person's dignity and freedom provides that the law's interpretation (hence determination of rights and freedoms) should be consistent with the values of a Jewish and democratic state[151] . The implication of this recent constitutional merger of Jewish values into Israeli law is yet to be seen[152] .

The sanctity of marriage has been suggested as one of the most undesirable concepts advanced by the police in domestic violence cases[153] , an attitude that, within a religious context or outside it, has far from disappeared in England too. The moral judgement of the victim, the hidden agenda of the law, still exists in both countries, although this existence does not make it more tolerable or justifiable in any way. The similarity makes it possible, however, to draw conclusions from one system to the other, and perhaps to suggest similar changes. The mutual conclusion seems to be that a process of fundamental political and social change is required, that would enable reformulation of the cultural content attributed to gender classification.

Marital rape, rape and feminism

As marital rape is just one aspect of the general rape offence, changes that have occurred, whether in legislation or in social perceptions, have affected it, and should be acknowledged. Reference to rape analysis is crucial to this account, since marital rape has not featured prominently in Israeli feminist literature, following the early seeming judicial abolition of the exemption.

Rape and other sexual offences have been a major feminist issue in Israel, just as in England, for the same reasons. Rape clearly represents the essential and most blatant form of gender coercion, encountered by a predominantly male legal system. A reform has thus been regarded as a symbolic recognition of women's rights. Rape, just as prostitution, offers different optional perspectives of relationships between sex (and hence gender) and economy, sex and violence, sex as means of expressing assumed (male) supremacy. Marital rape is an even better example, invariably involving traditional family hierarchy and values. Women's inferior position as an

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[150] The one notable exception has been the reliance on religion-based rules to avoid the marital rape exemption, as seen.

[151] In s.1 and s.8. op.cit.

[152] Eilon, the Supreme Court's Vice- President, a religious Justice who welcomed the provision, interpreted it as a direction to Jewish sources. (1993) .

[153] See Avni,N. (1990) , at p.181.

important factor in the analysis of this offence has been mentioned before as essential to both the traditional view of the wife as her husband's property, and the modern view which regards her as deserving special protection.

One feminist study of rape cases concluded that judicial decisions were reflecting women's inferior position in society[154]. However, an encouraging example of the way feminist philosophy has affected the judiciary was presented in *Bari* [155] . Overturning an acquittal of the defendants of rape, the Supreme Court emphasised the notion of consent, and not of resistance, in line with feminist ideology[156] , stressing the values of woman's equality and dignity as the foundations to the standards by which consent would be determined. The controversial case, which generated unprecedented media attention, involved a fourteen years old girl, who had allegedly consented to sexual encounters with several older boys over a one week period.

The importance of the verdict is enhanced by one local feature, the rapes being committed in a Kibbutz, a closed community where reluctance to complain about sexual offences (i.e.to expose Kibbutz life to police scrutiny) is immense, complaints seen as a betrayal[157] . Hence, the eventual convictions, as well as the previous acquittals, have had a unique symbolic impact. Socio-legal tolerance of sexual violence against women was categorically rejected. All that has been said so far about the importance of women's perceptions of their own rights and the link to the judicial system has been manifested in this case. If earlier it was the influence of social (including religious) perceptions that was stressed, here the crux is the potential impact of the judicial process on society, through the refusal to legitimate existing social norms. Had the Public Prosecution decided not to appeal, the situation would have remained highly unsatisfactory, the court decision in the first instance being interpreted as reproducing gender power inequalities and female vulnerability[158] .

Tendencies identified by feminist jurisprudence regarding rape may thus be relevant here, especially those attempting to reveal the social-cultural motives behind the legal discourse as expressed in specific legal provisions. Most of the issues, however, are not unique to Israel and will be discussed later, including the feminist acknowledgment of the "ideal offender" as different from the real one, criticising attitudes that had portrayed the rapist as a psychopath[159] and a stranger, and the parallel quest to relieve the image of the woman of its

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[154] Shachar,A.(1993), from p.188. Shachar had written her article before the appeal in *Bari* was decided, and it can only be assumed that her severe criticisms of the Israeli legal system's hidden agenda regarding rape would have been a little mitigated by it.

[155] Cr.A. 5612/92, *The State of Israel v. Bari* 38[I]PD302.

[156] One example of the theoretical basis for the emphasis is in: Hauftman,Z. (1982), at p.198.

[157] According to the media , the girl was persecuted and had to leave the Kibbutz. This exemplifies the way the woman is the one presented as the culprit and punished for it.

[158] Shachar,A.(1993), from p.188.

[159] Sebba, L.(1992), at p.50.

psychopathological perceptions.

Thus, feminism has been concerned with "victim precipitation", a term whose effect on the stigma attached to this offence has evidently been vast. Since the Israeli and English situations have been similar, the implications of the feminist struggle in this context will be jointly discussed regarding the English situation.

The feminist's more accurate portrayal of the participants would lead to a broader social perception of potential offenders and victims. It is self-explanatory that the broader the perception and the ensuing definition of rape become, more cases, including marital rape and male rape, would fit into it. A detailed discussion, including an analogy with prostitution, will be given in the next chapter.

However, feminism has not been the only active force in this field, nor the most powerful one, and, as Sebba agreed, it would have taken support from other sources to achieve a reform[160] , including the mentioned modern "law and order" movement[161] , or the public pressure to protect the young, which has led to the changes regarding familial violence, where women too have benefited, as an ancillary result. The instance of marital rape, however, has been unique in the uniformity of the feminist's stance and that of religion, at least the part of it used by the court.

Furthermore, it is not only family matters and feminist ideologies that would have been affected by the unique features of Israeli society. The violence tolerated in society, the double message conveyed by the religious norms contradicting the prevailing ideology, the legislative deviations from the principle of women's equality, all these have, among other factors, been analysed by Rosen-Zvi as contributing factors to what he regarded as 'the illegalism of Israeli society'[162] , referring to disregard and even hostility towards the legal system, a discrepancy between the work of courts and the assimilation of the norms and their observance by society. This observation may have affected several aspects of this discussion. The picture of a pragmatically motivated political system is not encouraging[163] .The rule of law, the educational role of the law, the responsibility of promoting values through the courts (and the implication on judicial creativity), all these issues have been mentioned and, especially in the context of promoting women's status, have been embraced, to a certain extent. Accepting Rosen-Zvi's portrayal of

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[160] Ibid. at p.63.

[161] Almost paradoxically uniting feminists and conservatives in the struggle to "get tougher".

[162] Rosen-Zvi, A. (1993), see p.239-241.

[163] It may be compared to the radical analysis of the 'crisis of hegemony' in English society since the end of the 1950s, the lack of social authority, although their emphasis was on the class factor. See Hall, S. (ed.)"The Law and Order Society: the Exhaustion of 'Consent'" (1978), at p.319.

courts detached from society may then present the whole issue as rather irrelevant.

However, Rozen-Zvi concluded that in matters regarding human rights, judicial intervention was desirable, as opposed to political matters. This conclusion accords with the observations made here concerning the educational role of the law, even if it may seem that society is not quite ready for it yet.

Marital Rape - England

History and judicial developments

The issue of marital rape may be seen as occupying a special place in legal thought for the last 260 years, from Hale's statement of the marital rape exemption[1] to the legislative abolition of the husband's immunity in the Criminal Justice and Public Order Act 1994. However, the first recorded judicial pronouncement, although presenting an interesting range of opinion, was an obiter dictum[2] , and the first reported prosecution for marital rape was encountered in 1949[3] . Furthermore, there had been only a trickle of early legal references, compared to the spate of material that has appeared since the late 1970's, particularly since the mid-1980's. Hence, it may be more specifically regarded as one of the legal debates developed in the second half of the 20th century, concurrent to the other controversies concerning the criminal law boundaries that have been analysed in this study. Thus, many of the arguments that stand out from the debate have been connected to legal and social theories mentioned regarding prostitution, and to modern discourses and areas of interest such as the changing face of society.

As most arguments and issues overlap, the following analysis will attempt to highlight the major features, even if demarcation has often been artificial. In order to enable a comparison both with the Israeli situation and the laws regarding prostitution, the discussion has been divided into three parts: 1. The legal development through judicial decisions compared to legislative attempts. 2. Prominent modern arguments, and 3. Broader ideological, social and political considerations with legal implications, which will allow a comparison with prostitution.

The implications of the specific form the legal development has taken will be the starting point, presenting a brief review of this development, before turning to some of the specific policy considerations that preceded the almost unanimous stance regarding the abolition of the rule.

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[1] Hale,1 *History of the Pleas of the Crown* (1736)629 .

[2] *R v Clarence* (1888)22 QBD 23.

[3] *R v Clarke* [1949]2 All ER448.

The legal development of marital exemption

Case Law

The case history of the marital rape exemption, along with the different official bodies discussing it, have been reviewed in legal literature often enough to allow concentration on principles and not on the details[4].

Briefly, since*Clarke*[5], several cases have developed exceptions to the traditional rule, albeit inconsistently, before legislation of the statutory definition of rape and after it[6] . This definition included the element of "unlawful", a term that had until 1991 been always interpreted as excluding intercourse within marriage.[7] The courts apparently accepted for a long time the rule set in *Miller*[8] , that the "irrevocable" consent could only be revoked by a process of law, hence recognising the possibility of revocation of the wife's presumed consent following judicial separation[9], where there was a court injunction forbidding the husband to interfere with his wife, or where there was an undertaking in lieu of an injunction[10] .

However, a certain judicial dissatisfaction with the husband's behaviour may be inferred from the application of alternative offences to the same facts, particularly assault[11] , risking criticism for the obvious inconsistency of the law. Indeed, it led to the curious result that even commentators supporting the repeal of marital exemption felt obliged to suggest extending the immunity to indecent assault, for the sake of legal uniformity.[12]

The judicial development could be seen as welcome, eroding the archaic rule without breaching basic principles of interpretation. Alternatively, it may be viewed as undesirable, helping to sustain the rule even when revocation of consent could be easily inferred without the existence of a formal legal separation. Furthermore, each case contributed to the volume of precedents,

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[4] e.g. J.L.Barton, "The story of marital rape", (1992). Rook & Ward,(1990), p.34-42. See also a detailed account of the law as it stood then in : Law Commission Working Paper No. 116: *Rape within marriage*, 1990, at para. 2.8-2.26 (hereinafter referred to as : 1990 Working Paper), and updating in: Law Commission 205, *Report on Rape within marriage*, 1992. (hereinafter refered to as: 1992 Report) at part I.

[5] *R v Clarke*, op.cit.

[6] Sexual Offences (Amendment) Act 1976, s.1.

[7] e.g. Williams,G. (2nd ed. 1983), p. 236. See discussion of the Israeli adoption of the term.

[8] *R v Miller* [1954] 2 Q.B.282.

[9] *R v Clarke*, op.cit.

[10] *R v Steele* (1977)65 Cr.App.R.22.

[11] e.g. *Miller*, Ibid.

[12] J.C.S., Commentary on *R v Kowalski*, [1988]*Crim.LR* 124, at 125.

whereas the fundamental contention concerned the very existence of the presumed consent, enforced by verdicts that merely indicated where it could be revoked.

A procession of cases that had been decided since the late 1980's, generated controversy, in departing in different directions, often colliding. In *Roberts* [13], a simple agreement between husband and wife (lacking non-cohabitation and non-molestation clauses) was recognised as effective to revoke consent, while in *Sharples* a revocation of consent was not accepted, although there had been in force a family protection order, as it had not been accompanied by an undertaking not to have sexual intercourse[14]. An order not to use violence was apparently not enough. Both decisions, although contradictory in their interpretation of the event that would suffice to revoke consent, did not question the basis of the marital exemption.

In *R v R* [15], a somewhat more radical stance was evident in the Crown Court's recognition of an informal withdrawal of consent. Although not necessary to reach a decision, Owen J. nevertheless expressed his opinion regarding an unilateral withdrawal from cohabitation as sufficiently implying revocation of consent, interpreting earlier decisions as relying on the presumed consent being limited to the ambiguous period of subsisting 'ordinary relations'. A first radical decision was reached in *R v C* [16] were Simon Brown J. declared (noting the similar stance of Scottish law[17]) that there never had been a binding authority for the marital rape exemption, remarking that that was the 'only defensible stance' in the late twentieth century. As the accused was acquitted, there was no appeal. Adversely, in *Henry*, the court extendened the immunity to offences of assault [18]. Thus, conflicting decisions were still reached, and in *R v J* [19] the court held that the 1976 Act had retained the immunity and the courts were no longer able to extend the boundaries of the law by setting exceptions to the traditional rule. The conclusion of this brief review is that the body of the decisions (with the notable exception of *R v C*) could hardly be portrayed as "progressive".

The Court of Appeal in *R v R* [20] , and later, the House of Lords[21] , have changed the situation dramatically by adopting a similar view to that expressed in *R v C*, denying the existence of the marital rape exemption, but founding it not on a declaration of the law, but on an interpretation that drained the term "unlawful" of contents and pronounced it "surplusage".

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[13] *R v Roberts* [1986] Crim.LR188. J.C.S., Commentary at p.189.

[14] *Sharples* [1990] Crim.LR198.

[15] *R v R* [1991] All ER 747.

[16] *R v C* [1991] All ER 755.

[17] Jones,T.H. [1990].

[18] *Henry* , reported in the 1990 Working Paper, p.98.

[19] *R v J* [1991] 1All ER 759.

[20] *R v R* [1991]2 WLR 1065.

[21] *R v R* [1991] 3 WLR 767, 2 All ER 257.

Legislative attempts

Since the statutory definition of rape, there have been a few pre-legislative attempts to modify the marital rape exemption.

Only in 1984, the CLRC recommended a partial erosion of the exemption, extending the offence of rape to enable prosecution where the spouses were not cohabiting.[22] A narrow majority of the Committee endorsed retaining the exemption if no satisfactory legal distinction between "cohabiting" and "non-cohabiting" could be contrived.

The recommendation was criticised as not contributing to a greater certainty, since the line drawn for cohabitation was indeterminate. At the same time, protection was not extended to all non-cohabiting wives [23], thus suggesting an unacceptable compromise. However, the recommendation was adopted in the draft Criminal Code Bill[24], whose writer, J.C.Smith,[25] urged its prompt legislation, coinciding with his general support of a criminal code, without referring to its rather obvious shortcomings. No legislation followed.

In 1990 and 1992, the Law Commisssion suggested that the immunity should be abolished in its entirety[26].

Analysis and conclusions

Ten years after Home Office support had eluded the CLRC, the amendment to the Criminal Justice and Public Order Bill 1994 that abolished "unlawful", was very briefly discussed, enjoying all-party support, while most of the discussion centred on male rape.[27] Furthermore, the MP who had proposed the change, Mr Gerrard, suggested that although it may have been argued that following the House of Lords decision this amendment was not necessary at all, the law, according to the Law Commission's recommendation, had still to be confirmed.[28] Thus, Parliament fulfilled an evidently secondary function in endorsing the judicial stance, although

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[22] CL RC, 1984 Report, *Sexual Offences*, para. 2.81-2.85, 2.102.

[23] Brooks, R. [1989], at p. 882.

[24] Law Com. No.177, Criminal Law: A Criminal Code for England and Wales (1989), cl.87.

[25] J.C.S., Commentary on *Rv Sharples* [1990] *Crim.LR* 198, at 200.

[26] 1990 Working Paper, op.cit., para.5.2. 1992 Report, part v

[27] Hansard, Parl.Deb.,comm. 1994,vol.241, col. 172-180. The Act has had a similar effect on jurists, who seem to have very much ignored this aspect of it and have concentrated on the more controversial issues. The several critiques of the Act in the 1995 Criminal Law Review, for example, did not mention this amendment.

[28] Ibid. col 175. per Mr Gerrard, MP for Walthamstow.

Parliament could, obviously, encounter allied issues which would have been outside the judicial power, including evidential matters and anonymity of the involved. Theoretically, it would also take into considerations broader policy issues. The point that such issues would have been more suitably handled through the course of a legislative reform than in court was made by the Law Commission in its 1992 Report. The Commission, interestingly, proceeded that "it is no criticism of the courts either in *R v R* or on any other of the recent cases"[29] , although a constitutional criticism would not have been unreasonable, stressing the limitations of the courts' sources against the (ideally) informed Parliamentary legislation.

The almost simultaneous occurrence of the House of Lords' decision and the Law Commission's Report makes it difficult to assess their exact effects on the ensuing Parliamentary process. However, awareness of the judicial process was certainly influential, exemplified by the oft-cited remark of the Court of Appeal, " a rapist remains a rapist"[30], repeated during the brief discussion.[31] Contrary to Marianne Giles' fear[32], the House of Lords' decision did not evidently postpone legislation by removing the sense of urgency, as the Israeli experience may be interpreted, but rather contributed to it by highlighting the archaic nature of the preceding law.

This seemingly independent development of the law evokes the immense question concerning the relations between courts' power, common law and legislation processes, in general and regarding the 1976 Act. Implied is the possibility of judicial law making and its constitutional implications. Was the decision in *R v R* a statute interpretation, overruling previous decisions according to the doctrine of precedent, or judicial activism? If so, is this allegedly relentless pursuit of a moral stance justifiable, or even desirable? What may the implications be?

Dismissing "unlawful" - Interpretation or judicial legislation?

Brooks' analysis of the authority for the marital exemption presented a legal construction similar to the one held by the Court of Appeal and by the Law Lords in *R v R* two years later (and specifically rejected in *Sharples* [33]) , namely that the term "unlawful" in the 1976 Act had been mere surplusage[34] . Thus, the legislation did not affect the marital exemption rule in any way, and its source had to be sought in the common law. Consequently, Brooks regarded a failure of the Court of Appeal to abolish the rule as leading to 'a bleak future for the development of the

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[29] Law Commission 205, *Report on Rape within marriage*, para.1.9.

[30] *RvR* [1991]2 W.LR 1065, at 1074.

[31] Hansard, Parl.Deb.,comm. 1994,vol.241, col.178. Per Ms Gordon, MP for Bow and Poplar.

[32] Giles,M. (1992a).Giles expressed the same sentiment again in: Giles, M., [1992b] , at p.416.

[33] *R v Sharples*, op.cit. at p.199.

[34] Brooks, R. [1989].

criminal common law'[35], and did not question the court's power to do so. According to Brooks, the function of the common law has been to adapt criminal responsibility so that it is consistent with developments in other legal areas and reflective of changes in social attitudes. How far the law should go in pursuing moral aims, which may well be reflected by the said 'social attitudes', was not discussed, but the very endorsement of such legal flexibility seems to indicate an approach closer to that of Lord Devlin rather than Hart's.

As Brooks' interpretation did not necessitate a comparative discussion of the extent of judicial and Parliamentary powers, an application of morals seemed far less extreme and would require less justification. It would have to comply with rules of diversion from precedents, not those governing creative interpretation. The abolition of the exemption would have been consistent with this function, considering that the only direct authority (*Miller* [36]) had been, according to Brooks, wrong.

The House of Lords in *R v R* considered this interpretation the only way to reconcile the Act with the exceptions that had been acknowledged throughout the years. The approving Law Commission was satisfied with a citation from *R v R* regarding the capability of the common law to change according to social, economic and cultural developments.[37] Acceptance of the judgment as appropriate interpretation has been implied.

Various commentators have held different views, analysing the judicial presentation as a facade for a process of judicial activism. The main body of criticism was provided in a series of commentaries by J.C.Smith, some referred to earlier. Regarding *R v R*, Smith urged to separate the social and emotional implications of the case from the statutory construction, concluding that the draftsman had not intended to depart from the rule.[38] The presence of the term in several other provisions of the Act served to substantiate his argument concerning the meaning[39], and to warn of the excessive implications of the construction. Allen, too, criticised the decision that would generate difficulties in attributing a meaning to the same term in other provisions[40]. Paradoxically, the Parliamentary discussion meant to endorse the House of Lords' decision could be seen as further support to this view, as the few MPs who expressed their

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[35] Ibid.at p.887.

[36] *R v Miller* [1954]2Q.B.282;[1954]2All ER529.

[37] Law Commission 205, *Report on Rape within marriage*, para.1.5. citing Lord Keith from: *Rv R* [1991] 3 W.LR 767, at p. 772. The Committee itself had supported a similar construction of "unlawful" in its 1990 working paper no.116,op.cit. para.2.6.

[38] J.C.S., Commentary on *R v R* [1991c] and in his comment on the House of Lords' decision: J.C.S., Commentary on *R v R* [1992], at 208. A similar construction of "unlawful" as subjected to qualifications appeared in: J.C.S., Commentary on *R v C* [1991a].

[39] The first judicial interpretation of "unlawful" as meaning "outside marriage" concerned s.19 of the SOA 1956: *Chapman* [1959]1 QB100.

[40] Allen,M., (1991).

opinion all clearly considered that it had been the term "unlawful" that crystallised the marital law exemption.[41] All these persuasive arguments mean that the common law construction appears less plausible than the possibility that the courts (and Brooks) have used creative interpretation of the law.

However, even if it is accepted that the court overlooked some rules of interpretation, could the result realistically be distinguished from the means? Would not it be desirable for the court to be creative in this case? But can it be legally justified? The motives behind the judicial decisions, or those that may be attributed to them, whether it was a relic of the court's conception of itself as the "guardian of morality"[42] (in a world where morality had been changing), or recognition of the harm, which would have justified criminalisation, these and other possibilities will be discussed, after questioning the nature of the legal development.

Judicial activism - justifyable?

Several commentators who reviewed the inconsistent cases preceding *R v R*, advocated "a speedy resolution of the problem by Parliament".[43] Even after the Court of Appeal's radical decision in *R v R*, Smith still implored the House of Lords to reverse it and leave reform to the legislator.[44] At least one author, however, Brooks, regarded legislation in this matter as 'a forlorn hope', urging the abolition of the rule by a 'courageous' Court of Appeal[45]. Others considered the construction as being within the courts' power to adapt the interpretation of statutes to the needs of modern society, leaving for Parliament (and the Law Commission) the task of clarifying related issues.[46] Indeed, on the pragmatic level it was recognised that the judiciary would probably take the first step, considering, surprising as it may be, that as late as 1991 an overwhelming Parliamentary support for the abolition did not exist.[47] Yet, should the practical consideration rule, despite the fundamental legal and constitutional reservations?

While most commentators appreciated the judicial development of further exceptions to the marital exemption, and the decision in *R v R* was welcomed by the government itself[48], few dissenting voices were still heard. Those who challenged it as an improper judicial activism

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[41] Hansard, Parl.Deb.,comm. 1994,vol.241, col. 172,175,178.

[42] For a discussion of this concept in the English history see: Goodhart, (1961).

[43] J.C.S., Commentary on *R v Shaw* [1991b], at 302.

[44] J.C.S., Commentary on *R v R* [1991c], at 478.

[45] Brooks, R. [1989], at p. 887.

[46] Harrison,K. (1991).

[47] J.C.S., Commentary on *R v C* [1991a], at p.63.

[48] According to the Law Commission 205, para.1.7. The Commission assumed an overwhelming welcome to the decision, presumably focusing on the appreciated result, as the criticism of the interpretation was not within the context of its discussion.

(particularly Smith[49]) should be distinguished from those, like G. Williams, who opposed the result, still considering marital rape as distinct from any other rape, an approach that will be viewed when discussing different policy considerations[50] . But how important is the technique that brought the change, assuming the result to be so desirable?

The fact that the judicial decisions were made just when the Law Commission had been preparing its report contributed to the criticism, but it was not essential, as the crux of the matter has been the alleged abuse of the judicial power in itself. Criticism, then, was comprised of two interlacing levels: the legal one - the radical construction of a statute, and the constitutional one - the extension of a criminal law by court rather than Parliament, summarised by A.T.H. Smith as ignoring the constitutional functions of the courts as intermediaries between the individual and the coercive powers of the state[51] .

In order to analyse the ulterior motives, to what possibly unjustifiable lengths courts would go in pursuing a moral aim, the court's function in this area will be compared to previous examples of 'judicial creativity' concerning prostitution and homosexuality, along with the parallel development of the Israeli case law regarding marital rape.

A comparison to *Shaw* [52] had been drawn by J.C.Smith with an earlier case[53] and repeated regarding *R v R*, to accentuate the perils of judicial law making, assuming that a difference in principle between the cases could not be found. Smith cogently claimed that the argument against extending the criminal law had been even stronger here, as a construction of a Parliamentary Act had been involved, rather than the essentially judge-made common law. Conversely, it may be argued that the power to develop an existing offence is far less dangerous than creating a new one[54] , although this admittedly may often be another fine distinction, requiring the introduction of some fundamental rules. In any case, an editorial in the Criminal Law Review (published before the House of Lords' decision) rightly predicted that a judicial abolition of the rule, although perhaps undesirable, would not cause as fierce reactions as those that had followed *Shaw* [55] .

Is the comparison accurate? Was the decision in *R v R* just another example of promoting

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[49] In his commentaries the author has consistently supported a legislative abolition of the rule.e.g. J.C.S., Commentary on *R v Roberts* [1986], at 189.

[50] However, it should be noted that Williams has generally considered the proper function of the judiciary to be a more limited one, favouring defendents' rights, as seen in: Williams,G. (1981), 71.

[51] Smith, A.T.H. (1984), at p.50.

[52] *Shaw v DPP* op.cit.

[53] J.C.S., Commentary on *R v C* [1991a],at p.63.

[54] For such a perception of the courts' power see: *Withers* [1975]AC 842, (1974)3 WLR 751, per Lord Dilhorne.

[55] Editorial "Rape within Marriage" [1991]*Crim.LR* 77.

morality while sacrificing legal principles, not different from *Shaw* or from the equally controversial *Knuller* [56]? Supporting the comparison means interpreting the extremely different social and professional reaction as based on the immaterial fact that those two cases had applied the offence of corruption of public morals to sexual conducts not favoured by conservative opinion holders, while regarding marital rape the prevailing, supposedly liberal approach itself demanded legal intervention. Even the possible existence of a rare social consensus, does not necessarily justify legal intervention, especially achieved in this particular way. The legal protest that surrounded *Shaw*, compared to the (generally) quiet welcome of *R v R* , similar to that greeting the Israeli precedents, does not mean that either decision was more justified, legally, than the other. However, it does mean that other factors, particularly moral and social views, have been dominant in the commentators' minds just as the judges'.

The basic question remains: when would judicial law making be justified? Does the timidity of Parliament in itself (even concerning a clearly abhorrent behaviour) justify the judicial expansion of criminal liability? M. Giles, for example, although criticising judicial law-making, has evidently allocated some of the blame to Parliament, for delaying the urgently needed reform[57] . A satisfactory answer to this question would provide guidelines against which many of the dilemmas concerning prostitution and marital rape, in England and Israel, could be judged on a more secure basis than the moral desirability of the outcome, and a more realistic basis than either the classical assumption of the supremacy at all costs of the right of personal freedom, or the arguably cynical view of court as a facilitator of convictions[58].

A comparison to the Israeli approach towards marital rape shows that the fine dividing line between interpretation and "judicial activism" has been shared by different systems. The lengthy discussion of the Israeli interpretation of the term "unlawful" exemplified a similar (although by no means identical) judicial attempt to depart from the past, albeit more hesitantly rejecting it, prior to a much delayed legislative change.

Despite the fierce contempt for the marital exemption always expressed by the Supreme Court, the following "personal law" content conferred on the expression was categorically an attempt to interpret the law in the narrowest possible way, yet without robbing any word of a meaning.[59] Although the decision differed fundamentally from the English cases that established exceptions to the rule in its absolute repeal of Hale's rule and the presumed consent, at least regarding Jewish people, a certain similarity remained in the resulting ambiguity about future cases, or, in

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[56] *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973]op.cit.

[57] Giles,M., (1991).

[58] Authorities for these two opposing stances may be found in : Smith,A.T.H. (1984, at p.48.

[59] This interpretation , based on the interpretation rule that 'the legilstor would not waste his words' was supported by the majority of the judges in the leading case of Cr.A. 91/80, *Cohen v The State of Israel*, op.cit., very briefly referred to in: Law Commission Working Paper No. 116, app. B, para.4.1.

the Law Commission's words: "the artificiality and complication caused by attempts to justify partial exceptions".[60] The advantage of such interpretation is that the formal adherence to a conceptual framework has legitimised the normative process, whether overt or hidden.

Few Israeli judges had supported the view held later in *R v R*, that the expression 'unlawful' was meaningless, hence denying the pertinence of the personal law. Prominent exponents were J. Ben-Porat[61] and the then Rep. of Chief Justice President of the Supreme Court (H.Cohen).[62]

The duration it had taken the legislature to embody the impending change in a statute is another parallel. Relationship between judicial intervention and delayed legislation may be construed in two ways. On the one hand, Giles, as seen, regarded maintaining the undesirable situation and not turning to judicial legislation, as the lesser evil[63] . Furthermore, the complacency with the legal situation following the existing precedents may have contributed to the postponed though much needed legislative response. On the other hand, this has been an apparent practical consideration for supporting judicial activity, not only as a quicker response to public pressure, but as an impetus to legislation. For the Knesset, it took six years, never denying the importance of the judicial developments for this eventual legislation. Arguably, ignoring the issue would not necessarily lead to any legislation, while a careful judicial treatment would contribute not only to the immediate situation, but also to Parliamentary awareness and, eventually, action. A gradual development of case law would have exemplified the advantages of a slow change, culminating in a more radical, although very much predictable, turning point, contrary to a hasty answer to some moral panic, usually favoured by legislators. However, the contradicting English authorities can hardly be analysed as "gradual". As practical considerations seem to support opposing attitudes, justification or denunciation of judicial activism should be based on firmer grounds.

Both Israeli court's interpretations were criticised. The personal law one, as it caused ambiguity and incorporated religious law into the criminal law, and the second, similarly to England, as the legislative aim was arguably misinterpreted or ignored.[64] Criticism was sparse, perhaps as the result had been coveted, and concentrated on the details of the constructions rather than on the legal principles involved. Although the assiduous controversy about judicial activism has not touched this particular legal area, pertinent conclusions may be inferred from the debate[65].

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[60] Law Commission Working Paper No. 116, para.1.4.

[61] Cr.A. 91/80, *Cohen v The State of Israel*, op.cit. at p.294.

[62] F. H.37/80 *Cohen v The State of Israel*, op.cit. at p.373.

[63] Giles, M., [1992b] .

[64] Shahar,Y.(1981), at p.655.

[65] For a general discussion of the possible collision between judicial activism and the rule of legality as it has been applied in Israel see:Levy,Y. & Lederman,E, (1981) op.cit. from p.97.

The prominence of the principle of legality, which demands a certain and prospective law, has led to questioning creative interpretation. Can any other consideration outweigh it in certain circumstances? Any answer should consider that the subject here is the criminal law, with its particular characteristics and function, including its fairly unique capability to restrict freedom. The topic of legislative adjudication is yet another aspect of the determination of the criminal law borders, the fundamental query of this account, and, as seen, is not detached from other issues including the key debate about criminalisation following morality.

The common law paradox, of the inherently retrospective nature of the case system on one hand[66] , and the principle of legality which has required the law to be prospective (and clear) on the other, has intrigued several jurists. Smith suggested that, at the very least, criminal liability should not be imposed unless it was clearly commanded by statute or common law, particularly regarding the House of Lords,where appeal would have been impossible[67]. The "minimum standards" governing criminal law creation were thus attached a greater importance than the "ad hoc proscription of particular abuses".[68]

In Israel, a similar sentiment was expressed by, among others, Levy and Lederman, who acknowledged opportunities for creative interpretation where legal provisions had been ambiguous and widely formulated, and courts had tended to give priority to "legislator's purpose"[69], even at the price of diversion from the language of the law. The authors have pursued a more constricting judicial self-enforcement of the rule of legality.[70]

However, it is debateable whether *R v R* has offended the principle of legality, as not every act of judicial activism necessarily constitutes a serious affront to the principle, and occasionally the advantages may outweigh the disadvantages. In his account of the similar Scottish predicament (mentioned approvingly in *R v C*), Jones analysed the two fundamental legal values of prospectivity and certainty[71], appreciating the relative nature of prospectivity and suggesting a test. Judging *R v R* according to his test, which appears just as applicable, the decision can not

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[66] The international principle against retrospective criminal liability has been set in Art.11 (2)of the Declaration of Human Rights of the United Nations (1949) and Art. 7 of the European Convention for the Protection of of Human Rights and Freedoms(1953).

[67] A.T.H.Smith (1984), at p.73.

[68] Ibid. at p.75.

[69] A most ambiguous term in its own right. See authorities to different and contrasting interpretations of it in: Levy,Y. & Lederman,E. (1981) , at p.82. An example of the difficulty where different opinions were equally built upon the elusive purpose was brought regarding the interpretation of "a place for the purpose of prostitution", whether it should include a residence, Cr.A. 94/65, *Turgeman* v The Legal Adviser, op.cit.

[70] :Levy,Y. & Lederman,E. (1981) , at p.125. The authors referred approvingly to Lord Reid's minority view in *Shaw*, discussed earlier .

[71] Jones,T.H. [1990] . He did not use the term "legality", as used here, since it implied criminalisation by legislation only, excluding judicial declaration, a point relevant to this discussion.

be said to have been "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" as it had been predictable on the basis of previous cases. Ironically, Jones aimed to require a closer judicial observation of these principles. Certainty is also relative, as a degree of uncertainty in the law is inescapable. Jones suggested that most people did not know the criminal law in detail. In this context, however, the public awareness raised by the campaign against the law, and the judicial decisions, would have arguably contributed to public knowledge of the legal uncertainty, thus to the predictability of the change. The less controversial Israeli decisions may have breached these principles more profoundly. Knowledge can hardly be presumed when an archaic personal law is applied, and certainty would be guaranteed only if the two parties were of the same religion.

This "reasonable forseeability" was prominent in the government's defense before the European Court of Human Rights, accepted by the Court. The Court dismissed the claim that the judgment had violated Art. 7 of the European Convention, regarding the preceding cases as "an evident evolution...consistent with the very essence of the offence".[72] In that, the Court seemingly applied the "thin ice" principle, criticised as assuming that morality is a sufficient reason for criminalisation (besides other criticisms, including the assumption of a consensus regarding the immorality, the constitutional point, and the neglected fairness principle)[73] . This conclusion is supported by the European Court's reference to the "essentially debasing character of rape" as denying the possibility of a violation of Art.7.1, the essence of the Convention being the respect of human dignity and human freedom[74] . However, as the point of contention here was a statute's interpretation and not a creation of a new common law offence (as in *Shaw*), these criticisms may be mitigated[75] .

The crux is, therefore, the limits of the legitimate considerations and interpretative rules, without which any assertion regarding the court's trespass of its powers will be meaningless. Three propositions have been suggested by Ashworth: 1. The "meaning in context" rule (an ordinary meaning but not the plain one[76]), 2. Approved ways of ascertaining legislative purpose, 3. The principle of restrictive construction[77] . All these elements have become part of this discussion at some point. Analysing the critiques, it has been essentially argued that the courts have

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[72] *CR v U.K.*, *SW v U.K.*, reported in: "No breach of Convention in removal of marital immunity from rape", *TheTimes* Human Rights Law Report, 5 December 1995.

[73] Ashworth,A.(1995),at p.72.

[74] *CR v U.K.*, *SW v U.K.*, op.cit.

[75] For the opposite view see: Williams,G. (1992), where Williams, before the case went to the European Court, expressed the view that ithad been a violation of the European Convention, just as a Parliamentary law would have.

[76] And see MacCormick,N., (1978, 1994ed.) , at p.209: Words have meanings dependent on conventional semantics and rules of 'normal' linguistic usage, showing why ascribing a clear meaning is often possible.

[77] Ashworth,A.(1991), from p.427.

abandoned the rules, taking excess liberty. In the discussed cases the courts certainly had to ascertain the legislative purpose, as they all apparently embraced the 'purposive approach'. As for the strict interpretation rule of penal provisions, preferring the value of personal freedom, if it is regarded as a supreme principle in its own right, the decision has clearly departed from it[78] . However, if it is understood as a last resort where the purposive interpretation does not succeed[79], than it may have been irrelevant in this context.

The rule that the court should endow a meaning to each of the legislator's words is fundamental [80]. Furthermore, it may be argued that in overlooking this rule the courts did not interpret the law according to the ordinary meaning, violating the first proposition. The use of the particular term "unlawful" may be compared to other ambiguous expressions, some of which exemplified, according to Ashworth, how Parliament actually delegated some of the legislative power to the courts. Vague legislative terms have been mentioned in this study, and their symbolic importance recognised, since referring to Wolfenden Committee's terminology which included "private" "decent" and "injurious", that would have led to judgement of values, as suggested by Hall Williams[81]. A. Barak has defined similar wordings as "valve-terms", providing nothing but a framework, while the judge would determine the contents, reflecting the social reality and prevailing social perceptions.[82] Barak argued that in order to fulfil this function of bridging between law and social reality, the elements should not be given the historical meaning but a modern one. Following this proposition, changing the contents of the term "unlawful" could have been done expressly, relying on new social realities, without declaring it "surplusage", and some contents would have to be construed. It would have still involved judicial activism, but not a word of the law would have been meaningless, and the court's choice could be a more honest one. From this perspective, the Israeli precedents applying the personal law have been more justifyable than *R v R* or the Israeli minority's view, as they, at least, have not dismissed the term.

The major difference between *R v R* on one hand, and *Shaw* and *Knuller* on the other, is the latter's seemingly blatant affront to the principle of legality. Furthermore, accepting Hart's approach, as has been done so far, denying a possible moral harm, it may be persuasively argued that another distinguishing factor was the actual harm caused by the marital rape. Ashworth's proposition that judicial creativity can be justified in terms of the major harm caused by the relevant behaviour (and the openness of the judicial argument), basing his principles of

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[78] As mentioned in this context, for example, in: Allen,M.(1991) ,at 352.

[79] Ashworth, A. (1991) , at p.432.

[80] *Williams* [1953]1 All ER1608, at p.1670.

[81] Hall Williams, J.E. (1958) .

[82] Barak, A. (1993), at p.22

interpretation on social values[83] , presents this difference as crucial to the justification of one judicial decision (*R v R*) and the denouncement of the other two, assuming that a "major harm" has indeed been caused. Moreover, this policy goal answers the difficulty raised by the principle of legality, as the raping husband should not have been surprised that his conduct would be brought within the scope of the law. Contrary to prostitution (the subject matter in *Shaw*), which had been controversial, by 1991 there seemed to have been a wide agreement regarding the undesirability of marital rape.

However, the criteria for judicial lawmaking recently set by the House of Lords in *C v DPP* [84] would lead to the opposite conclusion, as it stated that the courts should not make law, discarding fundamental legal doctrines, in cases of a doubtful solution, where previous Parliamentary legislation had left the situation untouched[85], on disputed matters of social policy[86]. Moreover, the necessity of finality and certainty following the change has been stressed. The predicament of *R v R* regarding at least three of the criteria was at best doubtful. The relatively recent Parliamentary or otherwise governmental discussions of both prostitution and marital rape contribute to the argument against judicial usurpation of the legislator's authority. Abandoned legal principles may include, besides the rule of law itself, the alleged infringement of Art. 7.1 of the Convention. As for the required finality and certainty, they do not seem to pose much of a problem regarding the English law, unless one argues the retrospective nature of the decision despite the "thin ice" justification. By comparison, however, it would have condemned the earlier Israeli situation, creating an inconsistently applied law by employing the personal religious law. Creative adjudication is not easily justifiable, then, in any of these cases.

According to Smith, the ultimate answer to this disadvantage of the common law would be the enactment of a criminal code, which would provide "certain guarantees", although he acknowledged a possible failure.[87] The Israeli experience, as far as it has been reviewed here,

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[83] Ashworth,A., (1991) , at p.443-449.

[84] *C v DPP* [1995] 2 All ER 43, from p.46, per Lord Lowry, following Lord Lloyd in *R v Clegg* [1995]1A.C.482, 2 WLR 80.

[85] A not dissimilar situation was analysed in *Clegg*, where the House of Lords took into account a recommendation made by the CL RC , which had appeared in the draft criminal code, coupled there with an approving conclusion of the House of Lords Select Committee. Nevertheless, as Parliament had not acted on the (weighty) recommendations, judicial law making was prevented.

[86] Thus, regarding *RvR* Ashworth regarded the social reasoning as more appropriately assessed by a committee (strengthening his criticism by the constitutional point): Ashworth, A., (2nd ed.,1995),.at p.70 and 340. A similar view was expressed by Lord Simon of Glaisdale in: *DPP for Northern Ireland v Morgans* [1973] AC 127, at p.137.On the other hand, Lord Lloyd in *Clegg* mentioned *R v R* fabourably as an example where social policy questions had not hindered the development of the law by the court: *R v Clegg* [1995]op.cit, at p.500, and distinguished it from *Clegg* on the ground that there the question was a part of a wider issue (mandatory life sentence for murder) that could only be decided by Parliament.

[87] Smith, A.T.H. (1984), at p.75. And see: Williams,G. (1981), atp.71.

does not appear to support this stance. The Israeli criminal law, since the enactment of the Penal Law in 1977, may be seen at least as semi-codified, comprised of a comprehensive body of criminal offences preceded by a "General Part" concerning interpretation (although not rules of interpretation), doctrines of responsibility etc., while other legislation has regulated procedure and ancillary matters. Additionally, several "Basic Laws" have attempted to offer a constitutional basis[88] , although this generally welcomed[89] "constitutional revolution", is far from complete. However, this apparently has not precluded judicial law making.

Would an inclusion of interpretation rules have helped? Should it have been included? It is submitted that judicial self-constraints, based on acknowledged basic rules, such as those suggested in *C v DPP*, would suffice[90]. It is doubtful whether even a formal adherence to the European Convention on Human Rights would have helped in a case like this one, considering the European Court's decision.

Smith assumed that when there is a code, there is a fundamental agreement about what is being interpreted and construed[91] . The current example, the similar English and Israeli confusing constructions of "unlawful", show that this agreement does not necessarily contribute to any greater certainty. By the 1991 turning point in England, like cases were not treated alike. Chief Justice Barak has differentiated three forms of judicial creativity: in interpreting the words of the law, in filling a deficiency in the law and in developing the common law by interpreting precedents and relying on basic principles in developing new areas.[92] The change from common law into statutory law has conferred a growing importance on interpretation, but the changed emphasis has not precluded the opportunities for creativity. Any system that would

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[88] e.g. The enormously controversial Law Foundations' Act, 1980, refers the court in case of a lacunae to decide by deduction and, if it fails, according to "principles of freedom, justice, integrity and peace of the Israel tradition". Chief Justice Barak, in a series of controversial decisions and articles, has tried to avoid reference to Jewish tradition by significantly reducing the scope of the definition of "lacunae". (see Barak,A., (1984) from p.125.) The implications of the recent Basic Law: a person's dignity and freedom,1992, which explicitly established the value of a Jewish state, on Barak's way are yet to be seen.

[89] See Rosen-Zvi, A. (1993) , at p.243. It should be noted that Rosen-Zvi supported judicial involvement and regarded the benefit of the constitutional provisions in the obstacles to the political agents, not the judicial ones.

[90] Reservations about the aptness of legislated rules of interpretation were discussed in: Ashworth,A., , (1991) , from p.425. It is comparable, at least from the judges' view and the constitutional angle, to the reservations mentioned regarding limitations on judicial discretion by way of introducing minimum sentences. And see Barak, op.cit.p.12, for the importance of judicial discretion.

[91] Smith,A.T.H. [1986], at p. 289.

[92] Barak,A. (1993).

enable interpretation according to the accepted "purposive approach"[93] and presumed "legislator's intention" will probably retain a certain scope for judicial activism, retrospective and uncertain, not to mention undemocratic, as it is. Flexibility and adaptability, within limits of certainty, however, may be viewed as indispensable qualities, as would be argued by supporters of the present case.

Suggestions that legislation would have been carefully drafted[94] seem not to be justified by discussed examples of hasty legislation, suffering from similar faults to those attributed to the judicial decisions[95] .In many reviewed instances, whereas Parliament ignored Law Commission's recommendations, it hurried to legislate when public pressure, partially evoked by controversial adjudication, mounted. A more complex relationship between Parliament and Judiciary seems to exist, especially in controversial areas, than the classic doctrine of the separation of powers (and the sovereignty of Parliament) suggests[96], whereby Parliament actually endorsed the judicial daring that had preceded its action and, perhaps, facilitated (by being promoted in the media and granted public support) legislation that did not carry a political risk. Both Parliament and the Israeli Knesset, the democratic bodies supposedly representing and expressing the people's sentiments, have been far less brave than the judiciary in tackling moral dilemmas.

The conclusion is that while *R v R* does not necessarily support those who oppose judicial creativity, it certainly substantiates hopes, such as Ashworth's, for an explicit recognition of underlying principles and policies.[97] Ideally, interpretation rules will be acknowledged by the courts, as judicial honesty would have been better understood and more correctly criticised than in the present cases, which have very much ignored it.

A sign that this stance may become accepted is found in recent Israeli legal literature.

It was mentioned briefly, regarding prostitution, that judicial activism has been a most controversial subject in current Israeli legal theory, and its echoes, due to particularly innovative cases, have reached the media and the Knesset in an unprecedented way. It is hardly a new topic. Over ten years ago, J. Hadassa Ben-Ito remarked that the function of the judge as legislator was one of the fundamental and difficult issues, ranging between the extremes of strict

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[93] Bell,J. and Engle,G , (2nd ed.)1987.Levy and Lederman have reached the same conclusion regarding the Israeli courts that would not hesitate to use wide interpretation where it fitted the "intention of the legislator".Levy,Y. & Lederman,E. (1981), at p.83. The two terms, the Israeli and the English, are clearly interchangeable, and equally vague.

[94] Ibid.

[95] e.g. See criticisms about legislation relating to kerb-crawling.

[96] This constitutional doctrine has been applicable both to England and Israel.

[97] Ashworth,A., (1991) , at p.446.

adherence to the law and the view of the judge as the tool to reach a better and more just law[98] . The cases reviewed here (regarding marital rape and prostitution) have shown that instances where the judges took the role outlined for them in the second category, practising judicial activism in different disguises, have been rife, perhaps more than would be admitted, at least when cases reached a high authority and the question, obviously, was one of law. The boundaries of the criminal law, then, have been made more flexible following the assumed freedom of the courts.

The greatest Israeli supporter of a degree of activism has been A. Barak, presently the Chief Justice President of the Supreme Court. A controversial recent decision[99] involved the expansion of a collective trade agreement to include the partner of an employee (a homosexual) as a beneficiary. The willingness of the Supreme Court to exercise what was seen as a particularly wide interpretation (to the term "a couple"), resulted in recognition of alternative structures of social relationship. The implications of the moral and social assumptions embodied in this case will be discussed later, here it is the general freedom assumed by the Supreme Court that is important. In contrast to previous exponents, Barak has always been candid about his perception of the boundaries of the judicial function, and has been promoting judicial activism in legal discourse for years. In the area of public law he has agreed to the importance of the "objective purpose", endorsing more radical activism concerning constitutional interpretation and moderate activism regarding statute interpretation. As for linguistic interpretation, he has vehemently supported the "purposive interpretation" even at the price of conferring an unnatural interpretation on the words.[100]

However, the sincerity of Barak's attitude entails the recognition of its limits: the judge's discretion (which becomes problematic only where a specific norm is not imposed by the legal system) is restricted by the framework of legitimate considerations[101] . Thus he has also recognised the importance of judicial self-constraints. In cases involving strong moral values, it can be expected, then, that the considerations will be scrutinised to determine their legitimacy, and the judge's elaboration may prevent criticisms such as those directed at *R v R* . It is hoped that Barak, just as the House of Lords in *C v DPP*, will continue to define those legitimate considerations.

Regarding marital rape, the courts' decisions and even the 1994 Act, although certainly meaningful, have not ended the debate. Effectiveness through enforcement and sentencing policies is yet to be seen, and therefore the following analysis of the modern arguments is still relevant, besides its obvious value to the study of the changing boundaries of criminality.

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[98] Ben-Ito, H. (1984) , at p.58.

[99] B"GZ 721/94 El-Al Israeli Airways v Yonathan Danilovitz and the State Employment Court.

[100] Barak, A. (1993), at p.30.

[101] Ibid. p.13

Modern arguments concerning marital rape

Can, and should, marital rape be differentiated from any other rape? If the husband's immunity could be justified on policy grounds, the pertinent question, as formulated by Brooks, is why the assault remedy was not perceived as the adequate charge between cohabitees, or between any couple who has had a previous sexual relationship.[1]

A starting point for the discussion of arguments concerning marital rape, will be one of the very few dissenting voices, against a background of an overwhelming approval of the abolition of the immunity (although not necessarily to the judicial method of achieving it). Glanville Williams has argued in a series of articles, and in addressing the Law Commission, that matrimonial sexual intercourse without consent should be marked by an offence less serious than rape, showing the persisting relevance of the analysis, even after the law has been changed.

Marital rape as an aspect of rape: legal and policy considerations

Social perceptions of sexual conduct generally, and rape, have always underlined the debate about marital rape. Several aspects have been stressed in order to differentiate between rape and non-consensual sexual intercourse within marriage. A central tenet argued an alleged lesser effect on the victim[2] , thus significantly underestimating the essential element of substantial harm[3] , although research had shown that it actually was a particularly traumatic type of rape[4], as well as one of the most common[5] (another misconception concerned the prevalence). The traumatic consequence could be anticipated, considering the trust involved in the relationship, the betrayal, and the accumulative effect on women of the tenacious portrayal of the family as a safe haven (an ideal that will be discussed).

The persistent perception of "real rape" (i.e."stranger rape"[6]), against the understanding of marital intercourse without consent as a non-traumatic minor incident, or the more dangerous

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[1] Brooks [1989] , at p.884.

[2] e.g. CLRC (1984) op.cit., para. 2.3: "The circumstances of rape may be particularly grave. This feature is not present in the case of a husband and a wife cohabiting..." For a similar view see: Williams,G. (1991), at p.206 and in: Williams,G. , (1992), at p.12.

[3] The centrality of the notion of harm to the function of the criminal law has been mentioned .

[4] See sources in: Temkin,J. (1987), at p.52.

[5] See e.g. sources in: Barton, C. [1991]. Zedner, L.(1995) , at p.186.

[6] e.g. Williams,G. (1991), at p.206. Williams used the expression "stranger rape" and later referred to the stereotypical "the stranger who pounces, perhaps wearing a mask" in Williams,G. (1992), at p.12. For a personal account of the system's notion of "real rape" and its legal implications see: Estrich,S. (1993) ,158.

portrayal of it as some male prerogative, assuming some fault of the wife[7], the reluctance to regard it as just another offence that may vary in its seriousness, should not be ignored. The significance transcends the denial of effective legal protection, especially as the view has not only shaped the legal system's reaction, but has affected the victims themselves.

Unfortunately, The CLRC's opinion that rape, in marital rape context, "cannot be considered in the abstract as merely 'sexual intercourse without consent'", was not unique, although this precisely had been the definition adopted in the 1976 Act. The modern view of rape, as enshrined in the Act, has considered the act of rape itself sufficiently grave to warrant criminal law intervention, therefore any element, whether of violence or deception, beyond the lack of consent, would have only constituted aggravating circumstances[8].

A legal change may not be enough. The classic (male) stereotype of 'stranger rape', dominating public perception, apparently requires a broader change through education, a crucial step towards female autonomy, without which the likelihood of an effective implementation of the law would be greatly diminished. Williams' remarks may be criticised, but if others, including judges, believe likewise, that marital rape is not 'a real rape' (or that any previous acquaintance would "taint" the lack of consent) a shift may only be achieved through a reform of social values. Similarly to prostitution, mainly the feminist movement has pursued this view and fought for it, considering it an essential part of the power struggle in society. As the following arguments will illustrate, the legal issue can not be separated from basic views about women, gender relationship, and the family. Both creation and function of the law can only be understood in the light of those ideologies. Educational or leading roles of the criminal law have been mentioned, and this is an obvious example where the law may be accused of perpetuating and justifying a consensual view on gender roles[9], when it could have facilitated a change.

In terms of general criminological perceptions, it may be submitted that while Williams and the CLRC represented the wish to regard deviancy as a distinct conduct (characterised by the stranger, the alien), an understandable position where the family is concerned, the modern

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[7]As described by Williams: "the husband, if distraught by what he regards as the unfaithfulness of his wife, deserves some consideration". Williams,G. (1992), at p.13. Both untenable assumptions, of him being "distraught" and her being "unfaithful" imply a shift of the balance of culpability in favour of the husband, and that is from the author who had called Hale's rule "an authentic example of male chauvinism":Williams,G. (2nd ed. 1983)., atp.237. Accepting that seriousness is being composed of harm and culpability [Ashworth,A., (1994b)op.cit. at p.40], Williams' approach have diminished both elements.

[8] The 1976 Act established the notion of rape as based on lack of consent following the recommendation of the Heilbron Committe in:Heilbron Committee (1975), *The Advisory Group on the Law on Rape*, para. 19-20. Interestingly, the Committee did not give sufficient consideration to the question of marital rape.

[9] As done by Carol Smart in: Smart,C., (1984), at p.21.

perception of feminists and radicals has conformed with views such as that of Box (following Durkheim), regarding deviance and convention as a continuum, sometimes overlapping[10] and hence more readily accepting the criminality of sexual offences within the family and, implicitly, realising that the private/public distinction was not always relevant. This issue is linked to the question of individual pathology opposite cultural factors that was brought up about prostitution and will be discussed again.

In order to give a full picture of the competing voices in the debate, it should be stressed that differentiation between types of rape was not a singularly chauvinist view. Several critics argued that treatment of such cases as rape would devalue the crime, which would be against the best interest of women[11] . Brooks claimed that even certain feminists had argued, paradoxically, that categorising unwanted matrimonial sexual intercourse as rape obscured the horrifying brutality and psychological trauma of "real rape". (According to his own astute view, rape, like other serious crimes, could not validly be put into such 'caricatured compartments'.[12]) However, Brooks did not cite any sources for this alleged feminist view, and feminist literature reviewed here, although not necessarily unanimous regarding other issues, has always stressed the variety of rape forms that should be recognised[13] .

The doctrine of consent:

The issue of consent as determining the limits of the criminal law involvement in sexual matters has been central to this discussion. Regarding any rape, it has been accorded a growing significance. The lack of consent is crucial, and may exist though no force was used, following the legal shift of emphasis from "against her will" to "without her consent"[14], an essential difference exemplifying the evolving modern perception of sexual integrity.

The Common Law marital exemption was based on the "absurd fiction"[15] that a wife could not retract her consent to intercourse given upon marriage[16] .

Irrevocable consent may be linked to demarcation of a person's power to chain his own

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[10] Box,S., (1983),see p.121.

[11] See sources in: Temkin,J. (1987), at p.51.

[12] Brooks [1989] , at p.886.

[13] e.g. in "The rapist who pays the rent", (1990), WAR campaigners ardently rejected the devaluation claim and held the oppostite stance, that it was the devaluation of the wife which devaluated every rape survivor.

[14] Smith,J.C.& Hogan,B. (1992), at p.454.

[15] Ibid. , at p.452.

[16] And see Mill's reference to the historic fiction of the consent given by the woman to the marriage itself, which was no more than a formal gesture, definitely not an expression of free will, in:Mill,J.S., (or.ed.1869., 6th ed. 1978), at p.30.

freedom, thus to the question of autonomy, the gist of this discussion. It is widely accepted that modern law has tried to rid itself of any manifestation of a person's legitimate power to subject his body to another in an irreversible manner.[17] The law has seldom permitted an agreement, providing that permanent harm would not be caused, or that the harmful act would be socially desirable[18] . It is unjustifiable that the law would let the person forfeit the power to revoke consent before the act has occurred, and it is unthinkable that such a concession would lead to exemption from liability where the harmed partner revoked his consent. Is the matrimonial bond so different from other social connections as to justify conditions that would be otherwise inconceivable?

The wife's predicament and a slave's have occasionally been compared[19] (the slave's position often found to be better), generally or regarding the right to refuse sexual advances, not only by feminist protagonists of marriage as sexual slavery (at least pre -*R.v R.*)[20]. The comparison stressed successfully the absolute importance of autonomy. As the Millian theory's significance has been mentioned, it is interesting to see how Mill perceived this issue as a degradation of women, despite his emphasis on free will (even to harm oneself) which could have theoretically led to supporting a consent doctrine.

However, the presumed marital consent belonged to an older set of reasons for the husband's immunity, heavily criticised as obsolete, inappropriate in modern society.[21] A contemporary perception of consent has been the ground for newer arguments.

Regarding prostitution, sometimes alleged to be a "victimless crime" or paternalistic, due to the parties' consent, certain critics, particularly radicals and feminists, have maintained that consensual activities that may be damaging to women should be recognised as such[22] , that socio-economical forces that turn free consent worthless must be considered, thus questioning the very basis of consent, presumed or real. The implications of such arguments on marital rape will be discussed when reviewing the feminist approach.

Glasman has argued that the establishment of consent as the determining question in rape law will hinder the criminalisation of consensual sex: prostitutes, kerb-crawlers, homosexuals and

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[17] Shahar,Y. ,(1981), at p.664.

[18] See discussion in: Rubinstein, A. (1975), p.102.

[19] Mill,J.S., (6th ed.1978) ., at p.31-32.

[20] Glasman,C. (1991).

[21] Brooks [1989] , at p.886.

[22] Lacey N., Wells C. & Meure D., (1990), at p.306.

others[23] . The author ignored the harm that has been the justified foundation of the offences of kerb-crawling and the possible justification of certain offences concerning homosexuals, including protection of the young. Consent is still just one aspect.

Consent and precipitation - victim's stigma

Going a step further from the premise of consent, one finds assumptions regarding victims' contribution to the act, a repeated argument in rape cases, which effectively shifts the blame from offender to victim.

"Victim's precipitation" is another area where feminism has been influential. This balancing impact has been necessary, as the frequent use of this term has probably strongly affected the stigma attached to the offence. Regarding no other offence such a weight of culpability has seemingly been ascribed to the victim. Marital rapes fall within the category of "contact rapes" or "rape by intimates", where the victim's attributed fault has been cardinal to the social reaction. It is, undeniably, the most extreme example where a relationship, with its particular dynamics, precede the act of rape. Portrayal of the contributing victim has a unique importance for marital rapes, then, where women would be prone to regard themselves as legitimate victims, and education, including through the symbolic and educational role of legal changes, would probably be required to transform this perception.

Significantly, the concept has not been limited to the criminal law. It can be identified in matrimonial courts, considering the wife's provocation[24]. Furthermore, a whole spectrum of co-operation ways has been recognised[25] , widening the scope this often questionable element. Feminists have predictably criticised the outcome of this approach, the legitimacy of the victimization.[26] Paradoxically, Box has argued that the feminist concentration on the victim had reinforced and encouraged this view of her as at least partly guilty of her fate[27]. It could be answered that feminist attempts to shift the emphasis from the sexual aspect of the offence to the violence have served to avoid this labelling of the victim. (Although it has been disputed, as the sexual nature of the act has had bestowed the distinctive seriousness.[28])The same strategy has been used regarding prostitutes. By emphasising socio-economic factors, feminists have tried to counteract some of the prejudices ensuing from the sexual aspect.

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[23] Glasman,C. (1991).

[24] See discussion of relief in cruelty cases in: Atkins S. & Hoggett B., (1984) , at p.130.

[25] See: Sebba,L.(1992), at p.60-61 for an analysis of the forms of possible cooperation.

[26] Ibid. at p.62.

[27] Box,S.,(1983), at p.131.

[28] Sebba,L.(1992), at p. 70.

Alternatives

Suggested and attempted alternatives falling short of a full recognition of marital rape, prior to the abolition of the common law rule, had been numerous. Considerable thought had apparently been given to ways of circumventing the offence of rape in these cases, even when public pressure for abolition was mounting. The alternatives to abolition are significant for this account in indicating the enduring perception of marital rape as not quite serious enough to warrant an equal criminal law protection.

The alternatives have varied between the application of other offences, invariably less serious than rape, including assault, to a partial erosion of the immunity, as seen in several reviewed judicial decisions.

The suggestion that charging of another offence would suffice[29] disregards the significance of classification of offences. It has been recognised that rape is far more serious than assault, and to limit conviction and sentence to the latter offence, when the former has actually been committed, leaves the criminal law confronting the occurrence wholly inadequately[30]. The theoretical basis for the offences, and the implications, are different. Regarding an assault charge, the condemnation would have been of the physical injury and not the forced sexual intercourse, ignoring the woman's sexual autonomy. This autonomy is essential to the rape offence and has been emphasised by the modern approach to rape (including by feminists who stressed the violent and not the sexual aspects of the act), acknowledging the intrinsic degradation, pain, fear and the lasting psychological harm, all the elements that have contributed to its perception as one of the severest offences. It would have been understandable only if the severity of rape were still based on property notions. Consequently, an implied ideological difference exists even between imposing a lenient sentence on a husband convicted of rape, taking into consideration the specific circumstances, and indicting him for an offence for which the prescribed maximum punishment is initially low.

The implausibility of this legal structure was exemplified in *Miller* [31] , where the husband was convicted of assault that caused bodily harm, even though no excessive force had been used beyond the force that had been necessary to submit the defiant wife. The heavy criticism could hardly be more justified.

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[29] e.g. White,R. (1990) , suggested that violent offences would make evidence more readily available and the sentences would be sufficient.

[30] See Brooks [1989] , at p.884.

[31] *R.v Miller* [1954]op.cit.

Moreover, the co-existence of the immunity of rape and the liability for an assault could not be easily reconciled. Some of the arguments (ideological, utilitarian and factual) concerning the exemption would be equally relevant regarding assault: would not the family harmony be harmed just as much by the operation of the criminal justice system? Why was it assumed that marriage entailed consent for coercive intercourse and not for the means without which the intercourse would have been impossible? The alternative charges were therefore seen as poor attempts to ease the conscience, inadequate and improbable because of the gulf between rape and assault offences, or worse, as a hypocritical veneer over an immoral stand, revealed by the very attempt to cover[32].

Other alternatives suggested a partial abolition of the exemption, or ranking rape offences according to seriousness, marital rape being a "second degree" rape[33] .

In 1980, the CLRC had recommended abolition, but stipulated that DPP's consent should be acquired before prosecution could be brought . In the Report, however, the CLRC recommended abolition of the immunity where the couple were living separately[34]. This recommendation was attacked as there seemed to be no valid reason for denying the criminal law's protection to the wife who was still living with her husband[35], particularly as the Committee did not have the constitutional limitations that could have explained the courts' resistance to abolition. The criticism is especially poignant considering that this cohabitation may well result from economic factors, not of any mutual will, which is the supposed reason behind the suggestion. Practically, the implementation of an offence based on such a vague element was regarded as problematic by members of the Committee, as discussed before. Both suggestions would have unjustifiably limited the access of the married woman to the law, compared to other rape victims.

In 1992, the Law Commission dismissed the alternatives of applying rape only where there was no cohabitation, rape only when accompanied by violence or other abuse, and a separate crime of non-consensual intercourse within marriage. A complete abolition was unequivocally recommended[36], since marital rape should not be labelled as less serious than any other rape[37] . Relics of the perception of marital rape as a lesser offence may still be found, however, in the authorities' treatment of perpetrator and victim, whether by prosecuting or sentencing, issues

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[32] Shahar,Y. (1981), at p.692.

[33] e.g. Freedman,M.D.A. (1979) , atp. 333. According to Freedman's suggestion, this second degree would include all cases where previous consensual sexual relationship existed.

[34] CLRC, 15th Report, (1984), para. 2.81-2.85, 2.102.

[35] Temkin,J. (1987) , atp.54.

[36] Law Commission 205, Report on Rape within marriage, 1992, para. 3.62.

[37] Ibid. para.3.59.

that will be discussed.

Procedural argument: Evidence and safeguards

The unique bond between victim and perpetrator has raised certain qualms and policy considerations concerning the abolition of the immunity. Both sides to the debate predicted undesirable consequences, either a flood of allegations or none.

Smith and Hogan have asserted that the practical problem of proof is the only difference between rape within marriage and outside it.[38] Is the difficulty singular? And if so, could it justify legal differentiation?

The point, if valid at all, would equally apply to cohabitees, and it has rarely been suggested that the immunity should be stretched to cover those cases. In principle, critics, including Temkin[39] and Brooks[40], maintained that difficulties of proof could arise regarding many criminal offences and had scarcely justified granting immunity from prosecution. Furthermore, the difficulty was comparable to that in child abuse cases, where decriminalisation has nevertheless not been considered[41] . The same point was evoked about different aspects of prostitution, mainly kerb-crawling[42] , where alleged evidential considerations had dominated the legislators' view for years and led to controversial proposals to add elements that would eventually limit the availability of evidence. The same hidden agenda has seemingly applied, beyond the practical difficulty. It is the fear of prosecuting the innocent male, the stigma and the devastating effect of being accused of sexually degrading acts, whether kerb crawling or rape, that have unjustly tilted the balance, resting on the alleged easiness of accusation and the difficulty of proof.

This consideration was expressed as fear of a multitude of vindictive allegations[43], despite knowing that there had been no such rush from wives alleging assaults, nor from cohabitees or girlfriends who could have accused their partners of rape[44] . Furthermore, this argument ignored the professionalism of the justice system, the capability of revealing false complaints[45], and the fact that the system did not apparently encourage even victims of severe sexual attacks to

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[38] Smith,J.C.&Hogan,B. (1992), at p.453.

[39] Temkin,J. (1987), at p.51.

[40] Brooks [1989] , at p.885.

[41] Hughes,F. , (1990).

[42] e.g. see the discussion of CLRC 1982, para.3.43.

[43] e.g. CLRC (1984), para.2.69.

[44] Brooks [1989] , at p.886.

[45] See Temkin,J. (1987), at p.51

approach it[46] . Thus, recent research[47] , although geographically limited. has found that the alleged legal reform has been ineffective, as attrition in rape and sexual assault cases still existed in every stage of the criminal justice system, particularly in the first stage (police) and in the last stage (a very low convictions rate). Perhaps more importantly for this discussion. the attrition rate was found to be highly affected by prior relationship between victim and perpetrator. particularly where there had been an intimate relationship[48] . Far from supporting the fear of false allegations (on which some of this attrition rate may be blamed). this research seems to emphasise the importance of investigating the criminalisation details, sentencing policies and practices, as well as the fundamental perceptions of the human agents that have shaped and implemented the law. This consequence is based on recognising the significance of law enforcement to the understanding of the contingency of criminal liability[49]. as has been done regarding prostitution, particularly kerb-crawling.

This portrayal of the vindictive woman (or, similarly , the unstable, the one who would want to withdraw her complaint shortly after making it, another argument that has not been peculiar to either women or to marital rape but mentioned as a fundamental consideration by those opposing it[50]) has been encountered before, for example, regarding the Israeli abolition of the corroboration requirement concerning living on the earnings of a prostitute, where a trace has nevertheless remained in the need to find in the material "something else" to sustain it. This legal treatment, differentiating it from other offences, was analysed as probably emanating from the classification of prostitutes as unreliable, which may have raised the probability of false allegations. The legal expressions of the debasing portrayal will be discussed again.

The role of the victim

Unlike the discussion of prostitution, where a recurring theme was that of allegedly victimless crimes, since only the more radical criminologists have systematically treated prostitution as concerning and creating victims, here it is the victim that has been a prime consideration for any legal thought.

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[46] In terms of physical abuse wives appeared to be particularly reluctant complainants. See Brooks [1989], at p.886.

[47] Gregory,J. & Lees,S. '(1996) .

[48] Ibid. at p.13-15. Although Gregory and Lees' data referred to a period prior to the decision in *R.v R.*, it seems unlikely that the results would have been very different, considering that in the term "intimate" the authors included only relationship that had a sexual dimension.

[49] See discussion in: Lacey,N.)(1995), at p.6.

[50] CLRC (1984), para. 2.66. While Williams,G. (1991), at p.206 referred to "the vagaries and and caprices of marital attachment". Even if one's view of the human race is not of rational beings, it is hard to imagine that whims would be the main reason to get involved in the legal process.in Williams,G. (1992), at p.13 he repeated this view.

The unique position of the victim has promoted two opposite arguments. Against apprehension of practical difficulties, a demand was made for her to have a greater influence on the procedure or the sentence. Claire Glasman, for example, has argued that the woman should not be made a compellable witness, in order to leave her some control over the process[51] . A similar view, although from the opposite wing, was expressed by Williams, who deplored "judicial bullying".

The characteristic of the cases which had previously led to discrimination against the victim, her relationship with the perpetrator, has been used to pursue the opposite stance, to assert a central role for the victim as a decision maker, in every stage of the legal battle, following the changing social cognition. Just as perceptions that have led to unfair legal treatment of certain agents have been considered, so should those that may lead to possibly discriminating advantages.

Should the status of the victim warrant legal rights that may not, or should not, be available to other victims? This is not the place to debate the complex question of victims' procedural rights, whether one of the criminal process' functions should be to allow self-expression of victims, or should the state's interest reign[52], beyond a necessary comment.

The victim's feasible wish to withdraw proceedings was answered by Temkin, who argued that sustained serious injuries provided a reason to continue the process whatever the wife's position, while if there was not a serious injury, police would probably be happy to drop the case, thus the victim's wishes could be taken into account when appropriate. This view may be construed as wishing to allow the victim a greater say in the pre-trial stage. However, it may be generally argued that as the criminal process should be a matter between State and offender[53] , the victim's involvement should be invariably minimal. Regarding domestic offences there may be a particular public interest in proceeding against the victim's wish, and not as an expression of paternalism. This proposal is supported by the proved link between rape and exceeding violence[54] and is strengthened by the premise that in most cases the wife's withdrawal could be effected by pressures and threats which would undoubtedly be greater if consulting the victim became the norm. This seems to be a potential ground for the criminal law to demonstrate its

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[51] Glasman,C. (1991). Williams,G. (1991), at p.247. Support of compellability see in: Edwards,S. (1990),at p.158.

[52] See discussion in: Ashworth,A., (1994b), at p.34 of the different implications of holding the restorative paradigm or the punishment paradigm. e.g. Involvement in the sentencing stage has been raised in the media recently about victims of personal injuries and families of murder victims.

[53] Ibid., at p.36. and see: Ashworth,A. (1994a) , at p.218.

[54] See Dobash R.E.& Dobash R., (1992), at p.270. See description of the relationship in: *R.v. T.* (1993) 15 Cr.App.R.(S.) 318.

protective qualities and not to withdraw them.[55] It will become particularly poignant when considering spousal homicides, when previous charges have been dropped. The same argument, the public element, would be equally valid against a claim for greater victim influence on the sentence.

Opposite the alleged increasing recognition of victims' rights of respect, support and even compensation[56], Gregory & Lees' mentioned research suggests that regarding sexual offences between intimates, the victims' basic rights are yet to be acknowledged, to allow them an equal access to the legal process, let alone further rights.

Sentencing

Sentencing in marital rape cases has evoked two questions. Is imprisonment a suitable penalty in such cases? If it is, what should the term be?

Williams, for example, opposed incarceration, thus justifying his call to create another offence without the stigma or the sentencing implications of rape, suggesting that the value of imprisonment in these cases would be to "help her to rearrange her affairs"[57] , presenting the issue as no more than a female whim, underestimating the specific seriousness of the incident and the social value alike. Furthermore, Williams considered the possibility of a divorce following imprisonment as a legitimate consideration. His reference to the "happiness of both parties" has been a striking antithesis to the private happiness that Mill assumed would result from women's liberation, crediting women with the ability to enjoy "rational freedom" [58], and the "happiness" which explained the proscription of marital rape in the traditional Jewish sources. Williams obviously ignored the link between marital rape and other forms of violence, and the recurring incidence of marital rape[59].

Williams' stance may be explained by the fundamental connection between the suitable, proportionate sentence and the subjective seriousness. Thus, in considering the suitability of imprisonment, the perceived seriousness of the harm caused by the offence would be of utmost value, were the offender sentenced according to the Criminal Justice Act 1991, according to which a custodial sentence for a sexual offence could be imposed either under the 'so serious'[60]

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[55] And note that Lacey N., Wells C. & Meure D.,(1990), at p.219 referred to a Canadian research which found that where cases had been pursued despite police's and women's reluctance, fewer repeated cases of violence had followed.

[56] Ashworth,A., (1994b), at p.34.

[57] Williams,G. (1991), at p.206.

[58] Ibid. Mill,J.S., (or.ed.1869., 6th ed. 1978) , at p.95.

[59] 80% of the victims had suffered more than one attack. See Barton,C. & Painter,K. (1991) , and Dobash R.E.& Dobash R., (1992).

[60] Criminal Justice Act 1991, s.1 (2).

test or as the only sentence adequate to protect the public from serious harm from the perpetrator[61] . Serious harm could be either physical or psychological[62] . Hence, if marital rape is viewed as less serious than any other sexual attack, the 'deserved' punishment will necessarily be minor. Imprisonment may not be deemed appropriate or, if it is, a short term will supposedly suffice. That is another angle of practical implications of the differentiating perception of 'real rape' compared to marital one.

Regarding the appropriate term of imprisonment, perhaps the obvious should be stated: whether the law can be used to combat attitudes and behaviour which imperil women will partially depend on judicial response. Separately from the questionable deterrence achieved through sentencing, the importance of legal denunciation has been stressed throughout this account[63]. Since definition of the appropriate sentence has been interlocked with the perception of the offence as different from the stereotypical rape and hence not as serious, a comparison to sentencing policy in other rape cases could be instructive.

The comparison to 'real rape' has evoked conflicting sentencing considerations. While it was argued that immediate imprisonment might not be appropriate, as this could[64] devalue other rape cases, Williams feared the opposite, that harsh sentences for stranger rape would transfer into severe sentences for husbands[65] . The conclusion of both approaches has been similar, providing yet another reason to differentiate between rape and marital rape, as they both emanated from some subjective disregard of the seriousness of either the harm caused, the blameworthiness of the husband, or both.

Soon after the decision in *R. v. R.*, at least one particularly lenient sentence raised doubts concerning the seriousness with which judges regarded the offence.[66] It may be argued that considerations particular to this kind of cases have determined the sentences, resulting from the connection between victim and perpetrator. The imposed term of imprisonment is inevitably likely to affect the victim and their family in a unique way[67] . It had been questioned earlier whether a previous relationship should always be a mitigating circumstance, besides acknowledging circumstances which undeniably contribute to the seriousness of the act,

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[61] Ibid. s.1 (2)(b).

[62] Ibid. s.31(3).

[63] See earlier discussion of: Walker,N. & Marsh,C. (1984) t. The Walker & Marsh research significantly showed that sentencing trends had a negligible influence on people's opinions.

[64] See Temkin,J. (1987), at p.51.

[65] Williams,G. , (1991), at p.247.

[66] Harrison,K. (1991) , at p.1490.

[67] The linked question of the victim's influence on the sentence is contended separately.

including use of force, weapon etc[68] . However, while taking specific circumstances into account is reasonable (as is the principle of sentencing anyway), it is hard to see why a potential prison sentence should have been regarded as so unsuitable for any raping husband as to justify creating an altogether different offence or to introduce the relationship as invariably mitigating.As for the sentencing policy in rape cases, the guidelines that had been devised by the Court of Appeal in *Billam*[69] [stating a five years starting point] were construed by Williams as akin to imposition of minimum sentences, contradicting the prevailing English attitude that had generally rejected the idea. Williams viewed it as an undesirable trend that would put pressure on the judge to sentence more severely than he would himself consider right, with particularly unfortunate results in domestic rape cases[70]. Minimum sentences, which should be distinguished from the severity of the punishment, were mentioned about the Israeli law, regarding proposals to impose minimum imprisonment sentences on all sexual offences, as a reaction to growing criticism against leniency. The comparison of judicial guidelines to prescribed minimum sentences would obviously depend on the binding power of those guidelines. If diversion from them is easier than from statutory ones, they may be seen as akin to an embodiment of the principle that sentences should comply fairly with similar offences[71], introducing coherence and promoting consistency and certainty.

On a general note, although reservations about minimum sentences have been persuasive, the need felt for them exemplifies yet again the enormous implication of changing social perceptions of seriousness, whether expressed through adjudication or through public, hence political, pressure. The perceived seriousness of the offence has also been an important factor in determining the length of the sentence according to the Criminal Justice Act 1991[72] . The serious harm regarding a sexual offence would even justify a longer, protective, term[73] . As this step may be construed as a departure from the proportionality principle[74] , the preconception of seriousness in those cases is stressed.

A review of cases where the rape was of a wife or a previous sexual partner[75] reveals that similarity in situational features to any other rape case has been vast. The cases have demonstrated a diversity of circumstances of the rape itself, leading to consideration of

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[68] See Temkin's suggetion for graded offences: Temkin,J. (1987), from p.95. The suggestion may be even more relevant as the law now acknowledges further acts that would constitute rape. e.g. See discussion of male rape.

[69] *Billam* [1986]1 All E.R. 985.

[70] Williams,G. (1991), at p.246.

[71] See a discussion of sentencing principles in: Ashworth,A., (1994b) at p.36.

[72] Criminal Justice Act 1991 s.2.

[73] Ibid. s.2(b).

[74] For a discussion see: Ashworth,A., (1994b), at p.40-41.

[75] The review here is of cases where relationship existed, not necessarily marriage, as the same principles were apparently applied. See later discussion.

additional factors in line with *Billam* , including a guilty plea[76] and accompanying violence. This similarity makes any differentiation seem all the more artificial. Furthermore, the cases have exemplified the variety and complexity of relationships categorised as contact rapes, from couples who had been together for years and had children, although they may have separated[77] , to those who had a brief acquaintance[78] , making any generalisation difficult.

The principle for sentencing a husband or a sexual partner was established in *R.v. Berry* [79]. Although acknowledging the seriousness of the offence and *Billam*'s guidelines, the court nevertheless distinguished between different kinds of rape and held that the violation and defilement, inevitable features in rape by a stranger, were not always present to the same degree when a previous long standing sexual relationship existed. This mitigating principle was approved in a series of cases[80]. However, many of these cases may support arguments to the opposite effect, that the relationship may actually aggravate the offence, as they have clearly shown the greater vulnerability of the woman, the implications of the violated sanctity of her own home, as in the frequent example of the man entering the premises, often violently[81], even when non-molestation injunction had been issued[82] .

In this respect, domestic rape may be comparable to either a rape by person in position of authority or trust, which will be discussed concerning children, as often a special dependence existed, or to rape by burglars, both considered to include aggravating features[83].

The other unique feature in those cases has been the weight of the victim's forgiveness[84], which may be seen as an indirect way of increasing the victim's authority, not necessarily a desirable approach, even if it were applicable to all rape victims or those of violent offences. In *Hutchinson* [85] , for example, the complainant had twice attempted to withdraw the charge,

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[76] e.g. *R.v. Mills* (1988) 10 Cr.App.R.(S.) 16.Lack of admission: Attorney-General's Reference (no.7 of 1989)*R.v. Thornton* (1990) 12 Cr.App.R.(S.) 1. According to this case the starting point in a contested case where relationship existed would be four and a half years, lower than that of *Billam*.

[77] e.g. *R v Berry* (1988) 10 Cr.App.R.(S.) 13.

[78] e.g. *R v Brooks* (1992) 14 Cr.App.R.(S.) 496.

[79] *R v Berry* (1988) 10 Cr.App.R.(S.) 13. Imprisonment was reduced from six to four years .

[80] e.g. *R v Maskell* (1991) 12 Cr.App.R.(S.) 638. Imprisonment was reduced from four to three years. All the mentioned cases have referred to *Berry*.

[81] e.g. *R v Workman* (1988) 10 Cr.App.R.(S.) 329.

[82] *R v K* (1990) 12 Cr.App.R.(S.) 451. *R v C* (1992) 14 Cr.App.R.(S.) 642.

[83] In just one example out of many, that of *R v Mason* (1995) 16 Cr.App.R.(S.) 860., a sentence of eight years was imposed on a nurse who raped a resident in a nursing home. An example of a rape of an adult was chosen deliberately, as cases concerning children are intrinsically far more severe.

[84] e.g. *R v Collier* (1991) 13 Cr.App.R.(S.) 33. A letter from the complainant to the court has been taken into account among the reasons that have led to reducing the sentence.

[85] *R v Hutchinson* (1993) 15 Cr.App.R.(S.) 134.

a move that was interpreted by the court as indicating a lesser degree of psychological and mental suffering, thus justifying reducing the sentence from six to five years. An even more extreme example is that of *Hind* [86], where the sentence of a particularly violent offender was reduced from ten to six years following the victim's forgiveness. Has not the court been too quick to relinquish public considerations[87], relying heavily on the possibly unfounded, and arguably irrelevant, premise that forgiveness necessarily meant a lesser trauma?

Twenty two cases that have reached the appeal court have been reviewed. The majority imposed sentences or sustained sentences of less than the five years guideline of *Billam*, occasionally as short as 18 months. The five years term was often reached as a mitigation of an original harsher sentence[88] . In a rare case of sustaining eight years imprisonment, for repeated rapes under threats and an eight hours ordeal, the court distinguished it from more lenient cases, on the ground that by the time of the offence the couple had ceased to cohabit[89], implying that cohabiting would have alleviated the severity of the act. These findings are not far enough from Williams' view, that even a one year sentence (reduced from two) would be severe, unless injury had been caused to the wife[90] . Furthermore, they conform with studies concluding that in the ten years period before *Billam* sentences not only had become severer, but stranger rapists had received a much larger proportion of sentences of over five years than non-strangers[91]. Both earlier research and recent conclusions may be construed as indicating the judicial tendency to accept the paradigm of the stranger rapist as the guideline for determining the seriousness of rape cases. None of them considered the uniquely distressing features of the rape.

Two degrees of rape have thus been practically created, reflecting degrees of denunciation, a suggestion that had been rejected by the legislator. Furthermore, emphasis has evidently been put on violence and threats[92], elements that had been excluded by the statute. Underlying such a low degree of condemnation some moral judgements must exist. Accepting that quantifying harm is closely related with the values of dominant social groups and with evolving social attitudes, among them the changing status of women[93], a deeper change seems still to be desired. Otherwise, even if severe sentences are pursued by the judiciary, male jurors may not

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[86] *R v Hind* (1993) 15 Cr.App.R.(S.) 114.

[87] A rare remark to this effect was made in: *R v Henshall* (1994) 16 Cr.App.R.(S.) 388, where, in any case, serious aggrevating circumstances existed.

[88] *R v Brown, R v Hutchinson, R v C* (1992), op.cit.

[89] *R v Cox* (1994) 16 Cr.App.R.(S.) 72. A similar argument was raised in: *R v Malcolm* (1994) 16 Cr.App.R.(S.) 151.

[90] Williams,G. (1991), at p.246.

[91] Lloyd & Walmsley, cited in: Lacey N., Wells C. & Meure D.,(1990), at p.348.

[92] e.g. *R v Haywood* (1991) 13 Cr.App.R.(S.) 175. *R.v. W.* (1992) 14 Cr.App.R.(S.) 256.

[93] Ashworth,A. , (1994a) , at p.211.

be keen to convict[94], an even less desirable consequence than lenient sentences. It may be unfavourably compared with sentencing considerations regarding ponces, as expressed both in statutes and judicially, which have been much harsher and condemning, almost vindictive, altough harm has often been questionable[95] .Regarding prostitution and homosexuality, it was asked whether criminal justice policies may be expected to contribute significantly towards social reforms (if not to induce them), through criminalisation or decriminalisation. The modern arguments against the abolition of the marital rape immunity have signified the other aspect, the uselessness of a legal reform without profound social changes. The sentencing issue especially raises the question whether the assumed consensus[96] about marital rape was not rather too optimistic, in the deeper sense of a true condemnation of the act. Next, some of the values and ideologies which may have advanced or hindered the social change in the discussed areas will be discussed, and a broader comparison to the other discussed areas will be made.

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[94] As suggested in: Editorial, "Rape after the House of Lords", (1991) *New LJ*.

[95] e.g. See *R v Dixon & Dixon* (1995) op.cit. Although no evidence of coercion or corruption existed, the accused were sentenced to 30 months imprisonment, reduced to 18 months on appeal.

[96] e.g. Hughes,F. (1990).

Ideological, social and political considerations with legal implications- feminists, liberalism, radicals and religion

Private/Public - The Theoretical Basis for Arguments Against Intervention

A major modern argument against the repeal of the marital rape immunity was the unsuitability of the criminal law for encountering familial matters. The ideal of privacy in the family home has been contended at all levels, from the police to the victims themselves[1]. Article 8 of the European Convention on Human Rights is one example of the perceived alliance between privacy, family life and the home[2] . Any intrusion of the law could therefore be expected to be persuasively justified.

This alleged unsuitability may be analysed on two levels, the social or emotional level and the theoretical (or ideological) one.

On the emotional level, a natural, understandable desire exists to see the home as a safe haven, detached from the outside world of both violence and legal scrutiny, even at the price of ignoring reality. Shattering the idealised image would never be easy. This exactly is the reason why Williams' assertion that rape by a stranger is a greater menace to society[3] is dangerous, underestimating and reinforcing both the menace from within the home and society's oversight. An obvious reason for the unique seriousness of familial violence is the opportunity for repeated attacks[4], a premise supported by mentioned research, substantiating the recurring incidence of marital rape.

The questioned suitability of the criminal law is linked to the ideal of the family, attaching heavier weight to the interest of the familial unity than to the woman's autonomy. The obvious criticisms, such as that of Temkin, whose contribution to the debate has been acknowledged, questioned the desirability of reconciliation as a supreme goal and compared it to the unjustified different legal predicament of cohabiting couples[5] . Furthermore, it may be seen as an unrealistic approach, assuming that an uninterrupted situation will miraculously get better, not dissimilar to

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[1] See different discussions inPahl,J. (1985) .

[2] It should be noted that S.(2) acknowledged the need to intervene "for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[3] Williams,G. (1992) , at p.12.

[4] The point was stressed in: Lacey N., Wells C. & Meure D.,(1990), at p.218.

[5] Temkin,J. (1987), at p.51.The Law Commission discussed this goal and concluded that priority should be given to prevention and not reconciliation: Law Commission Working Paper No. 116, 1990, para.4.34.

the argument that battered women should not complain in order not to exacerbate the situation[6] .

However, while this is one way of presenting the argument, Temkin seemingly pointing in the direction of stressing the social perception of the family institution (an issue that will be discussed), and perhaps acknowledging the different roles of criminal law and family as competing control mechanisms, the argument has another facet, the legal distinction between private and public.

As seen previously, distinction between "private" and "public" spheres as determining the limits of criminal law intervention has been essential to the discussion of criminalisation of sexual conduct ever since the Wolfenden Committee asserted, following the liberal tradition, that "it is not...the function of the law to intervene in the private lives of citizens... further than is necessary to carry out the purposes we have outlined"[7] , presumably leaving private immorality outside the boundaries of the law. Despite persuasive criticisms that "private" had little relevance to the criminal law[8] and that a "double morality" was the result of the distinction between "public good" and "private morality"[9], the notion has nevertheless become established as a principle.

Imperative to this comparison between offences is the argument that Wolfenden's stance regarding prostitution stemmed from the need to support the family in the face of powerful countervailing forces in the post-war era, by insisting on the discussed distinction[10], an aim far beyond the formal and probably theoretical boundaries of any official body.

Nothing could be perceived as more private, hence further outside the scope of the criminal law, than the family home, especially the sexual activities of family members, although, paradoxically, modern marriage itself is a legal institution[11] . This view had unmistakably been adopted by the 1984 CLRC Report, which consequently recommended retaining the husband's immunity. Similarly, the recommended abolition of the immunity contained in the 1990 Working Paper was criticised by conservative campaigners as "interventionist". The opposite stance may be detected in demands for legal definition of a person's matrimonial sexual rights and duties[12], an equally questionable designation of the law's boundaries.

Has the decision in *R v R* signified a legitimate shift in the borders of the "private" and the

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[6] See discussion regarding battered women in:Waits,K. (1993), at p.199.

[7] The Wolfenden Report, ch.2 para.13

[8] G.C. (1957b).

[9] Hall,S. (1980) , at p. 12-14.

[10] Zedner,L.)(1995) , at p.182-183.

[11] For a comparison between marriage and other contracts see: Honore,T.(1978), from p.10.

[12] Barton,C. & Painter,K. (1991).

"public" or had this distinction been wrongly pursued from the outset ? The alleged connection between liberalism and sexual regulation policies is even less clear here than regarding prostitution. This may be the place where liberal and feminist discourses have departed, since the distinction was regarded by some feminists as yet another way not to regulate certain male activities[13] . This intersection between feministm and liberalism may be unexpected as so far, especially as expressed in the mutual emphasis on the significance of autonomy (reviewed concerning the notion of consent), agreement regarding the criminal law's role could have been assumed[14]. This assumption would have been further substantiated by views such as Mill's plea for the perfect equality of the sexes[15] , remembering that his theory was at the purported foundations of Wolfenden's philosophy.

While regarding prostitution many feminists have generally supported a diminished legal intervention and unification of offences where possible (e.g. Edwards), or, in the more extreme regions, claimed that the criminal law was not applicable for feminist purposes, marital rape has evoked constant demands for an effective legal expansion which would inevitably be more invasive and at the same time regarded as progressive. Has feminism and its supporters abandoned the liberal tradition? Or can these stances be reconciled? Would a "pure" liberal have used the "private/public" distinction to justify the Common Law rule?

As feminists have held that "the personal is the political"[16] , relevant studies have scrutinised, since the mid-80s, the basis for the distinction, presenting it as no more than a shifting border[17] , or attempted to show its fallacy by proving a continuous intervention. Even the law's refusal to condemn a certain behaviour, particularly domestic violence, has been interpreted not as neutral but as influential[18] .

Lucia Zedner has argued that the absence of formal law did not necessarily represent an absence of regulation. In fact, it may have reflected the greater strength of non-legal regulatory mechanisms of social control, among them the family[19] . The social control over women provided by marriage and domesticity have similarly been one of the basic feminist

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[13] e.g. in Smart,C.,(1984) , at p.xii Smart hints at it when she interprets the reproduction of the private sphere in the law as ligitimising the preconditions which create an unequal power structure, and at p.27.

[14] For the hisorty of liberalism's influence on feminism see: Rhode,D.L. (1989), p.12. The liberal fundamental notion of "autonomy" has been central to the concept of rape, as seen.

[15] In: Mill,J.S. (or.ed.1869., 6th ed. 1978) .

[16] Grageor,R. & Morgan,J. (1990), at p. 30.

[17] e.g. Katherine O'Donovan as cited in: Lacey N., Wells C. & Meure D.(1990), at p.315. Smart,C., (1989).

[18] Smart,C., (1984) , at p.221.

[19] Zedner,L. (1995).

assumptions[20] . Other authors even argued that this family regulation had been responsible for the false image of crime as occuring between strangers[21] . Regarding marital rape, this conclusion may not be wholly relevant, as Zedner's historical account mainly concerned incest, a conduct that has apparently been always widely condemned, from the biblical rule[22] to the ecclesiastical offence, and therefore has had a stigma (and an incentive for self-regulation) that has not necessarily applied to marital rape. In the absence of such stigma a formal condemnation would have presumably had a greater declaratory effect, besides the regulatory one.

However, Zedner's[23] analysis of the relationship between the state, the family and the regulation of sexual conduct, showed that contrary to the traditional liberal perception, where the family did not fulfil its regulatory capacity, state's intervention has never been too far, through moral and religious values in the 19th century or, later, through welfare agencies. Contrary to the liberal (or, more often, politically conservative) belief, then, there has been no "unregulated private domain". Moreover, intervention has not been only a legal regulatory matter. Sociology too has had a growing interest in what was described as "a black box"[24] , the household, exemplifying that there has been an interdisciplinary change, perhaps indicating wider social changes, regarding the home.

Hence, Zedner's study is valuable here in elucidating the factual fallacy of those who supported leaving the family outside the boundaries of the law, basing it on some image of the protected family, and in her portrayal of the variety of the initiators of criminalisation in this area. Furthermore, this broader view of legal regulation as only one of numerous regulation agencies that should not be ignored[25] has the theoretical foundation of thinkers such as Foucault, who mentioned the sustenance of the nuclear family and the heterosexual monogamy by those other additional regulatory agencies[26], cautioning of the danger of regarding the law as a separate entity thus assuming an unrealistically great liberalism. This realisation drains the private/public dichotomy of much of its contents. However, the study of the developments that have led to the criminal law's intervention, with all its particular coercive and condemnatory power, in this particular area of privacy, should not be underestimated. After all, criminalisation is still singularly powerful and symbolic.

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[20] e.g.Heidensohn,F., (1985) , at p.180.

[21] Lacey N., Wells C. & Meure D.(1990), at p.218.

[22] Incest was one of only three proscriptions that sould not be overcome even when a life threat existed. See: Maoz,A. (1992),at p.267.

[23] Zedner,L. (1995) .

[24] Finch J. & Morgan D. (1991) , at p.60.

[25] A view often held by feminists: e.g. O'Donovan,K., (1985) ,ch.1 has linked indirect state intervention to policies in areas which would necessarily invade the family, enforcing and creating a nuclear family with a gender related division of labour.

[26] In: Foucault, (1979) .

The earlier silence of the law regarding marital rape can not be justified by this liberal stance (apparently acting here as an excuse for non-intervention) but would have to be explained by other values. Moreover, this view of the private/public dichotomy offers a negative answer to the question whether there has been an intrinsic inconsistency among those (mainly feminists) who supported abolitionist theories in relation to certain offences (e.g. prostitution) and a growing intervention in other cases, primarily concerning domestic violence. As the private and the public are contingent, if relevant at all, intervention will be determined in every case on its own merits.

It should also be remembered that the radical analysis of the alleged social crisis of the 1960s-1970s[27] identified the growth of the women's movement, along with critiques of the family, as two factors perceived by the public as subversive, contributing to the breakdown of society. Public support for the feminist struggle to penetrate the barrier of the family's immunity, joining these two factors, is therefore surprising.

The Relevance of Gender and Feminist Critique

As discussed, society regulates the conduct of its members in a number of ways. The rule of law is the most obvious and coercive, but there have also been other formal, although less condemning, forms of control, such as welfare services, and the informal means of shame and guilt, control through the family. These forms of control interact in the sphere of sexual behaviour and invariably affect the criminal law, from the argument that sexual offences within the family are best encountered by informal means (including restrain of family itself), to the influence on the victim. The likelihood that a wife would complain would obviously diminish, even if the conduct has been criminalised, if society still disgraced her rather than the offender[28], and still presented the ideal family as the model that should be achieved, while condemning failure. Thus, morality (which triggered the shame in the first place) would modify the law and its effectiveness in complex ways. Society's preconceptions of rape would be crucial in reinforcing the feelings of remorse and, consequently, the victims' own low self-esteem[29] . As examples brought earlier of the portrayal of the woman could hardly be bolder, the feminist influence in broadening the perceptions has been invaluable[30]. Conversely, authors such as

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[27] "The Law and Order Society: the Exhaustion of 'Consent'" in Hall S., Critcher C., Jefferson T., Clarke J., Roberts B.(ed.) (1978), at p.323.

[28] See a discussion of the reason domestic violence victims do not complain in:Hayes,M. & Williams,C. (1995) , at p. 305.

[29] Hughes,F. , (1990).

[30] One example of the similar importance attached by Israeli feminists to departure from male perceptions as a base for women's self-image, a crucial step on the way to equality: Shachar,A.(1993) . at p.172.

Williams, who have promoted the image of the woman who wants to go back to her bullying husband as a legitimate consideration against criminalisation, and have ignored the stigma still attached to the raped woman, have arguably contributed to the vicious circle in which those women find themselves, without a proper awareness of the basic value of autonomy. The subsequent unused law would indeed look as an unsuitable solution, an implication mostly disregarded[31] .

Thus, the offence of marital rape should be viewed in the broader framework suggested by social legal theories, prominently those of feminists or radicals. While many women have written about marital rape, a feminist view is one that has regarded it within the wider understanding of the power structure of society and has not limited the struggle to the criminal law, but pursued further reforms.

Marital rape has been one of the offences were women have played a major role in the process that led to criminalisation, and later, in the fight for adequate sentencing, along with the ongoing struggle to challenge the perception of "stranger rape" as the only "real rape". The importance of women's rights campaigns[32] and authoritative academic voices, especially that of Temkin[33] , in striving for the removal of "a pillar of patriarchal right"[34] can hardly be over- estimated. Unlike regarding prostitution, where the visibility has been literal, the fact that marital rape became such a public issue exemplifies the changing times and sexual mores, and the political influence of the movement, often doubted. The power of public pressure on the process of legislation may be demonstrated by the sheer volume of academic reactions and media involvement, compared to that pertaining issues related to prostitution and homosexuality, such as the age of consent. Another contributing factor to the publicity of the perceived injustice was the Prosecution Service's decision to pursue the cases, although the result, prior to *R.vR.*, was uncertain. Furthermore, unlike prostitution cases, the cases reached the higher judicial authorities (as demanded by the classification of the offence) which are ineviatably more publicly visible.

Reasons for this public interest in the rape offence may be speculated upon. Debating rape has seemingly been more advantageous for the feminist discourse itself. The prevalence of the

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[31] Research has found that even in cases where threats and violence were involved, a significant number of wives refused to acknowledge the act as "rape": Barton,C. & Painter,K. (1991) . This result supports the claimed relationship between social perceptions and the legal process.

[32] e.g. Both the acknowledgment of an accomplishment as a result of the outcome of *R v R* and, on the other hand, the realisation that the fight had not ended for Women Against Rape have been clear in: Glasman,C. (1991).

[33] Temkin, J., , (1987).

[34] Harrison,K. (1991), at p.1489.

offence in all social classes[35] has broadened the appeal of the debate, that served as a strategic point benefiting the political power of the feminist movement, or any other that supported the change, contrary to the issue of prostitution, from which most women have felt detached and would have presumably been reluctant to be associated with[36] . Theoretically, while there has apparently been some discomfort in among feminists concerning prostitution, because of the prostitute's ambiguous role[37], here the roles have always been clear: the woman as the submissive victim and the man as the aggressor, roles that have embodied the feminist perception of the world hence constituted an ideal battle field. Consequently, the feminist's campaign in this area, although perhaps not yet accomplished, has unsurprisingly been more successful in making a social, and perhaps legal impact, than regarding prostitution.

As the gender of the victim and its significance could not be denied, even those who opposed a change, particularly Williams[38], claimed to represent the opinion of women, although it would have been the "sensible married woman who is not a lawyer"[39], a likely companion to Wolfenden's "normal, decent citizen" and Lord Devlin's "right thinking man on the Clapham omnibus". All, of course, fictitious legal creatures, previously mentioned in approval of the Radical Criminologists' criticism of them as an orthodox standard against which public conduct was to be measured, yet another expression of the male, middle class orientation of the law.

The development of the legal attitudes and the feminist reaction to rape has been quite parallel. While the "permissive" era of the late 50's and 60's constituted the crucial starting point of the modern debate about prostitution and homosexuality, here the 70's fulfilled this function (although social and legal trends that have been identified regarding earlier era have undoubtedly, if indirectly, affected the law regarding rape). The awakened interest of the feminist movement suggests at least a partial explanation[40] . The interest in the rape offence

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[35] Although it has been suggested that domestic violence is more common in lower classes: Avni,N. (1990).,a t p.170.

[36] Contemporary feminists have criticised the white middle class background that had tainted the earlier feminist works, presumably affecting their relation to prostitutes too. e.g. Edwards,S. (1990) .

[37] See :Heidensohn,F., (1985) , from p.27, for hints of the differences between the articulate middle class feminists and the prostitutes' organisations, who attempted to change the percetption of prostitution as furthering sexual stereotypes, and the broader question whether female crime is female emancipation. Smart,C. (1985a), at p.68, discussion of the dubious appeal of prostitution to women's movement campaigns. Smart,C.and Brophy,J. (1985b), at p.5,discussing the historical debate within the movement regarding supporting prostitutes.

[38] In: Williams,G. (1991).

[39] Ibid., atp.206. It is hardly surprising to find that Williams used the metaphor of "dragons" presumably to refer to feminist pressure groups, whom he later called "warrior feminists" , "fierce feminists" and "the vociferous ones".

[40] See the discussion of the roots of the American as well as the British movement for the recognition of domestic abuse in the late 60's and 70's: Dobash R.E.& Dobash R. (1992) , at p.287.

became central to the feminist discourse in the 70's[41] . The first statute aimed specifically at domestic violence was enacted in 1976[42]. The Women Against Rape campaign started in 1977[43] .

Interestingly, although the Israeli feminist movement has not been as popular and advanced, as discussed, the developments in this area have followed the English ones rather closely, if a little late[44] . The Karp Committee remarked, that it had been the women's movement, along with victims' rights groups, that had generated awareness to domestic violence[45] . Most reviewed significant feminist writings that addressed the legal issues started to appear in legal literature during the 80's[46] .

The feminist discourse would easily explain the continuous legal imperviousness to the anguish of the wife, just as it contributed to the understanding of the legal treatment of other sexual offences, including prostitution, and would equally well explain unsuccessful enforcement. Numerous issues that have preoccupied feminism will be relevant here. These include the recognition of a wider variety of harmful conducts and diverting from the classic (male) stereotype of stranger rape, development from rape as defending property[47] to rape as respecting autonomy and sexual integrity, the connection to "acquaintance rape" or "date rape" (the only difference being the formal "ownership" of the husband here), and, above all, the acknowledged connection between gender and law. All these are imperative here as much as concerning prostitution, but perhaps with different accents. Some of this issues and their theoretical implications will be reviewed, inferring from general dispositions to the specific issue of marital rape.

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[41] e.g. Smart's influential book, Smart,C., *Women, Crime and Criminology: A Feminist Critique* , (1976).Smart referred to the meagre criminological studies of rape that had previously existed. For appreciative reviews of the book as a significant turning point see: Heindensohn F., Rock P., McIntosh M., Smart C. "Review Symposium- Women,crime and Criminology by C.Smart", (1977).

[42] Domestic Violence and Matrimonial Proceedings Act 1976, and, later, The Domestic Proceedings and Magistrates Courts Act 1978. And see account of women's movement impact in the last 20 years on Home Office and police policies regarding rape and domestic violence in: Newburn, T., (1995) , p.156.

[43] "The rapist who pays the rent", (1990) *New L.J.*. The article detailed the campaigners' actions which led to the 1990 Law Commission's recommendation.

[44] The first refuge for battered women was opened in 1979, compared to 1971 in England, and the first research was published in 1979. See Avni,N. (1990).

[45] "Report of the Committee of investigation, prosecution and trial policy in violent offences within the family: Violence between spouses" (1989) in Raday F., Shalev C., Liban-Kooly M. (ed.)(1995), from p.280, Ch.B s.8.

[46] e.g. Izraeli N., Friedman A., Schrift R., Raday F., Buber Agassi J., (2nd ed. 1982) .

[47] Smart,C.(1976), at p.78.

Rape , Marital Rape and Prostitution

The sexual aspect of the institution of marriage, the other element in the "marital rape" issue, and a background factor in the discussions of prostitution, has, like the other discussed issues, conveyed a symbolic significance[48] . Feminists and radicals alike have drawn the probably simplistic but thought provoking comparison of wife and prostitute as suppliers of sexual favours for economic reward[49] , female sexuality gaining the status of a commodity. It may seem that while protecting the autonomy of the wife means protection against interference, regarding the prostitute it would mean protecting her choices. It may be therefore assumed that the pursuit of sexual freedom would lead to contradicting views of legal intervention in these cases.

However, the similarity may be greater than realised at first glance. Most feminists have emphasised the difference between sexual freedom and exploitation[50] . Similarly, it has been argued by the radicals that while both have lost the choice not to consent, the moral debate, which had ignored the dimension of gender, had obscured the fact that the consensual activities may be damaging to women[51] . The ideologies of free market economy and free expression have concealed women's exploitation. The prostitute's alleged "autonomy" and "choices" should thus be regarded as coerced, and so, presumably, should the wife's coerced consent. Both will consequently be perceived as victims[52] . Moreover, prostitution appears to be connected to violence, exposing the prostitute to a risk[53] , which may be explained or validated by any theory regarding the general link between assumptions of gender, sexuality and violence, equally relevant to rape, marital rape or incest.

Smart has soon realised the affiliation between these two sex-specific offences (relating mainly to female solicitation), categorising it as prostitution, rape and sexual politics[54], analysing the cultural attitudes behind the legal condemnation. The similar aspects of the offences required explanations of the different legal treatment. The 'double standard' was employed again, stemming from the moral code and reflected in the law, that restricts a woman's sexuality while

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[48] It has, for example, been mentioned that one of the factors that may cause the degradation of a girl, according to Jewish sources, is late marriage.Dr. Warhaftig,I.(1982).

[49] Smart,C.(1976), at p.88 cited Engels' and Kinsey's propositions, at p.102-103, 105 Smart scrutinised the tradition of sexual bargaining, sexual availability being the woman's valued asset, whose value has been reduce.

[50] e.g.Atkins S. & Hoggett B., (1984) , at p.80.

[51] Lacey, N., Wells C. & Meure D.,(1990), at p.306.

[52] See earlier references to Susan Edwards' portrayal of the prostitute as a victim.

[53] A rare reference may be found in: Wilson,E.(1983) , at p.97.

[54] Smart,C. (1976) , from p.77.

encouraging male (heterosexual[55]) activity[56] . The prevailing perception of different sexual needs, according to Smart, has resulted from the power structure, which would stigmatise the prostitute or the rape victim and understand the client or the rapist[57]. Assumptions that homosexuality or promiscuity were pathological have been encountered here. Other feminists have strengthened this stance by analysing the discriminating view of sexuality implied in other legal areas[58] . Furthermore, these studied sexual politics have linked between violence (male aggression) and sex. The overdue abolition of the exemption, the suggested alternatives, the lenient sentences, besides the inadequate legal treatment of kerb-crawlers and ponces, may all be construed as legal authorisations of this connection.

An important Feminist crusade has concerned the positioning of the rapist in a social context, related to a time and a place, and not in an individualistic context which portrayed him as sub-normal[59] , thus highlighting the contributing systematic cultural factors. The importance of shattering the psychopath image to the acknowledgement of a broader range of potential rapists, among them husbands, has been similarly recognised in Israel[60] . A similar disposition presented the violent husband or father as merely an extreme form of the normal man, establishing his dominance[61] . A comparable attitude was observed regarding prostitution, where the recently offered social-cultural explanations have replaced the pathological perception of the vocation. However, whereas assumptions concerning prostitutes and homosexuals have facilitated classifying them as criminals[62] , and the struggle has been to banish those assumptions in order to limit criminal liability, regarding rape those assumptions about the group (husbands) led to the opposite stance, reluctance to view them as criminals. The plight of the prostitutes' organisations has therefore been analysed by feminists as challenging stereotypes of female behaviour, rather than merely campaigning for the prostitutes' rights[63] .

The legal implications of the changing perceptions as have been examined here, have confirmed Smart's general observations, although relics of archaic perceptions persist. One striking example is the discussed fear of false allegations based on the portrayal of women as indecisive, which still corresponds to an alarming extent with the orthodox criminology's portrayal of

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[55] See analysis of the disciplining of the homosexual as well as the female consent in: Duncan,S. , (1995) .

[56] The unashamed differentiation between female and male sexual needs was mentioned earlier, their "irregular indulgence of a natural impulse": Sumner, M. (1980), at p.90.

[57] Smart,C. (1976) , at p.104.

[58] e.g. The implications of adultery in family law as studied by: Atkins S. & Hoggett B., (1984), p.81.

[59] e.g.Smart,C. (1976) , at p.105.

[60] Sebba, L.(1992), at p.50.

[61] e.g.Wilson,E.,(1983), at p.95.

[62] See discussion of criminalisation and predisposition in:Lacey,N. (1995), at p.7.

[63] e.g. Heidensohn,F., (2nd ed. 1996), p. 29.

women as "creatures of psychological peculiarity, psychiatric disorder or irrational impulse" or "cunning"[64] . This issue is connected not only to gender prejudices, but also, on another level, to the perception of crime and deviancy, as mentioned in the discussion of perceptions of rape. Box's suggestion of a continuum of deviancy or McIntosh's theory of the flawed individualisation of the criminological discipline itself[65] , both theories complementing Smart's arguably rather uncomplex earlier assumptions[66] .

Socio-Economic Considerations

The theoretical implications of a possible association between social-feminism and leftist criminology, largely built on Marxism, have been described[67]. Regarding marital rape, prevailing throughout the social classes, socio-economic factors may have been less apparent than concerning prostitution, interpreted as a capitalist enterprise[68] , although legal intervention may have been class-determined[69]. However, a connection between marriage as a financial unit (or even, somewhat cynically, a financial transaction) and sexual regulation within the family should be mentioned. Furthermore, economic inequality has been depicted as a contributory factor to rape, generally[70] . The basis is recognition of the economic forces shaping the woman's domestic role, her free labour leading to power differences, and the mentioned comparison between the financial outcome of sexual relationship for the wife as for the prostitute, both caught in 'patriarchal dependence'. Moreover, an economic analysis is capable of explaining some legal intervention. According to Olsen, who compared the dichotomy between public and private to the one between family and market, with the gradual larger role women have occupied in the market came the diminishing familial immunity from outside scrutiny[71] .

There has been a more recent call to recognise financial threats as coercion regarding (marital) rape, in a legal system "dominated by male assumptions about what constitutes force"[72] . As it would mean that acquiescence under financial duress would vitiate consent, the scope of the

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[64] Rock P. and McIntosh M., in "Review Symposium- Women,crime and Criminology by C.Smart", (1977, p.393, 395.

[65] McIntosh M., Ibid. at p.396.

[66] In her later works, however, such as *The ties that bind*, Smart presented a more complex legal analysis, far from conspiratorial theories.

[67] Although the New Criminology has been accused of 'sex-blindness': Gregory,J. (1986) , at p.62.

[68] See sources in: Lacey N., Wells C. & Meure D., (1990), from p.357.

[69] See Zender,L.(1985), at p.178,181 for an analysis of the class-determined legal intervention regarding sexual offences within the family in the 19th century , and the prevailing middle-class family ideal, another example to the far from neutral nature of the law.

[70] Box,S., (1983), at p. 150.

[71] Olsen,F.E. (1993) .

[72] Barton,C. & Painter,K. (1991) .

rape offence would be broadened[73] . Although financial dependence would undoubtedly increase vulnerability, such an extension, particularly of the criminal law, may nevertheless be undesirable. Without elaborating on the complicated question of the point of view from which consent should be checked, whether the man's, the woman's, or that of the "reasonable person", it may be assumed that had this stance been widely accepted, in many marriages the wife's consent would consequently be deemed coerced, and marital rape would become easier to prove, perhaps too easy, therefore presenting a constant threat. It would be tantamount to basing the consent on the "reasonable person" perception of it, without relating to the circumstances, which would be the ultimate protection for women from sexual assaults, but could lead to injustices.[74] Rather, perhaps the most important of the pursued reforms would allow women a financial security which would enable breaking from the dependence on the husband[75] .

Acknowledging financial pressures would also mean that former arguments regarding the allegedly paternalistic nature of provisions, particularly those proscribing living on the earnings of a prostitute, may have to be revised, as the prostitute's consent would have frequently been coerced in this sense, hence impaired, not just ignored. Theoretical justification for such provisions could then be more sound than previously argued. Supporters of 'progressive' changes should consider these further implications.

Modern Perceptions of the Family and Marriage

Regarding prostitution, the notion of the family has been in the background, as part of the moral arguments and value judgements. It was maintained that relaxed laws would threaten the family[76], and, as seen, that Wolfenden's hidden agenda was to support the family [77].
Concerning marital rape, however, family and marriages have been brought to the forefront. The need to rethink the concept of 'the family' has been acknowledged as crucial in the fight against domestic abuse[78] . At the root of every stance held in the debate a certain perception of family and marriage may be identified, implied or expressed, each engendering assumptions and ideals that would affect legal thought, including regarding the suitability and extent of

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[73] See S.Box (1983), at p.152. Also cited in Israel: Sebba,L.(1992), p.56

[74] For the general question of the reasonable person's point of view in the rape offence see: Shahar,Y. (1989),at p.96-104.

[75] Glasman,C. (1991). and "The rapist who pays the rent", (1990) *New LJ*. Further policy issues included child benefit, mintanance paymentsetc, which are probably more desirable as they do not involve the criminal law.

[76] A study of judge's remarks in: Smart,C. (1985a) , at p.53.

[77] Zedner,L. (1995), at p.182-183.

[78] "Implications for policy and practice " in *Private violence and public policy - the need of battered women and the response of the public services* , (1985) op.cit., at p. 187.

criminalisation. Thus, the WAR campaign stated that "rape, like charity, begins at home"[79] . Adversely, 1984 CLRC's resisted criminalisation for fear that it would "undermine marriage as an institution". Therefore, the perception of the family, whether the "ideal" middle-class nuclear unit[80], or some other, less prevalent ideal[81], would have swayed the law and the theories responding to it. A changing conception would hence generate legal changes or a modified effectiveness of existing laws.

Correlation between social, ideological or political developments and legal ones verifies this connection. The description of the hesitant and gradual judicial and Parliamentary steps preceding the abolition of the husband's immunity, along with the indeterminate implementation of the current law in all stages of the justice system, conforms with Zedner's study of the ambiguous place of the family on the political agenda[82] , for while it has been a central tenet of political discourse[83], hailed as "a place of refuge", at the same time it has been exposed to growing scrutiny[84] , an ambiguity clearly reflected in the legal sphere.

Recent outcries in England regarding single mothers' rights, and those in Israel regarding the newly established Family Courts[85], emphasise the huge importance still attached to this institution. This latter law is a particularly acute example. It has been authorised to try, among other things, civil actions according to the Law for Prevention of Violence Within the Family 1991. Not only does this law recognise family matters as a legal category deserving a separate treatment, whether justifiably or not, but it also allows for external, non-legal agencies, to be involved in the legal process, in an unprecedented way, incorporating criminal and civil law issues as long as they refer to familial matters.[86] Does the special treatment bestow family matters a higher or a lesser status? Is the line between law and other disciplines more blurred here than in other legal areas? and should it be? Whatever the answer, a differentiating

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[79] Glasman,C. (1991).

[80] Interpreted as the family form of the 19th century bourgeoisie: O'Donovan,K., (1985) .

[81] e.g. The feminist idea of an extended matriarch based family as found in: Greer,G. (1984), from p.197.

[82] Zedner,L. (1995).

[83] See sociological discussion of the 'back to fundamentals' (similar to the recent 'back to basics') political emphasis of the 80's, interpreted by the new right as a 'realistic' approach, in: Finch J. & Morgan D. (1991) .

[84] e.g. Bainham,A. , (1995) . Bainham called for a broader social policy support of alternative family forms, challenging the 'traditional family values' and arrangements.

[85] The Law of Court for Family Matters, 1995.

[86] According to S. 5 of the Law of Court for Family Matters,1995, an "assistance unit" will be founded, and will supply services of "examination, advice and treatment of family matters". As the exact details of this operation, including required qualifications of the people involved and the relationship with the court, would be determined later, the law may be criticised for introducing a vague dimension into the law, an extra-legal factor that would not have been considered appropriate for any other legal area.

perception clearly prevails, the family still occupies a unique place, with vast legal implications.

Besides the political right wing's concern for the stability and health of the family, and it should be noted that in both England and Israel recent years have been marked by a right wing government[87] , the family has been the focus of other discourses. However, a link between right reformists and feminists (suggested by Zedner), following mutual calls for specific changes[88], is problematic on a deeper level, as a closer inspection of the approaches will show.

While certain feminists have seemingly developed a simplistic argument regarding prostitution laws, as a man-made apparatus of repression[89] , a more complex approach (described as "The Familialist Model"[90]), often cited in this account, has placed the family in the centre of the interpretation of the law. Therefore, the discussion would be incomplete without understanding the feminist concepts of the family as a focal point at which ideological and economic oppressive practices meet[91], marriage, and the political significance of the 'patriarchy', although it should be noted that in the 1980s dissenting feminists argued that analysis of marriage should not be central to the feminist analysis[92] .

This diminishing immunity of the family from criminal law intervention has been linked to sociological factors, among them the changing position of individual freedom generally and women's particularly, and the ensuing reduced social value of the institution of marriage, traditionally always connected to the notion of 'a family'. New perceptions of marriage in terms of harmony and collaboration[93] have shown that the "happiness" mentioned in the Jewish sources has become a widespread standard. According to sociological studies, the change towards the companionate marriage intensified in the 60's and 70's[94], concurrently with the discussed feminist awakening, both phenomena probably sustaining each other. Also relevant to the issue of marital rape has been the evolving perception of sex within marriage as an important expression of positive emotions[95] . Optimism, however, led eventually to realisation

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[87] Although it may be less significant regarding Israel, apart from the question of the religious power, as the division has more to do with political inclination rather than conservatism. With the coming election in England, the situation will have to be evaluated again shortly.

[88] Andsee: Edwards,S.(1990),at p.147.

[89] e.g. Susan Edwards.

[90] Brown,B. (1986).

[91] e.g. Smart,C., (1984) , from p.10.

[92] See Smart's objection to this argument in: ibid. from p.143. It is her admission in the connection between the legal structure (via marriage) and the notion of the family that enables this discussion.

[93] As described by Morgan: "from institution to relationship". Morgan,D. (1991) at p.126.

[94] See discussion in: Richards M.P.M &Elliot,B.J.(1991), 33.

[95] Ibid. at p.38.

that equality had not yet been achieved[96], therefore the struggle would have to continue.

While this social value has, perhaps, never been great enough to justify, on its own merits, a serious harm to a person's integrity, his body and his freedom, its fall from grace has presumably contributed to legal scrutiny be made possible. It is enough that divorce is no longer considered a disaster. However, it can not be assumed that the institution of marriage has lost all its social power, therefore legal impact. Sociologic research shows that it has remained very much as popular[97] . On the legal level too, as Smart observed, types of 'unorthodox' household structures have always been understood in terms of a superior, lawful form of family life, based on marriage[98] . Even prostitution has been discussed in court in the context of idealised marriage or monogamous relationship[99] .

It may be inevitable that in a social structure still built on marriage, as reflected in family law[100] , criminal law too will be slanted by underlying perceptions. This would explain suggestions that the criminal law is a blunt weapon to use in domestic affairs, the legal treatment of cohabitees, and other issues, less relevant, including the legal position of "single parent families". Temkin and Brooks disputed the alleged ineptness of the criminal law, as the point ignored the variety of relationships which existed, both inside and outside marriage, and the comparison to the cohabitee[101]. However, considering the foregoing premise, their answer, undoubtedly reasonable, appeals logically whereas a complicated web of illogical motives has apparently been at force.

Some revealing remarks, indicating family and gender perceptions implied throughout the justice system and the legal discourse, still exist. Quite surprisingly, as late as in 1980 Lord Denning, professedly praising the crusade for female equality, considered the woman's chief responsibility to be the maintenance of "a sound and healthy family life...". Furthermore, to this responsibility all other interests must be subordinated.[102] Lord Denning's deep set belief was that our civilisation had been built upon sound family life, the only basis for which was a Christian marriage, apparently endorsing a doctrine that rejected the idea of divorce. Similarly, the traditional Jewish law has assumed that the woman would prefer the married status at almost any cost[103] . This may take the issue ad absurdum, but it demonstrates the undesirability of granting such moral stances a binding legal position, directly or not. The legal implications of

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[96] See description of the "realistic" 80s in:Finch J. & Morgan D. (1991) ,at p.63.

[97] Ibid.

[98] Smart,C., (1984)., at p.xii.

[99] Smart,C.(1985a) , at p.54.

[100] See a discussion of family law in: Parry,M., (3rd ed.1993) .

[101] Brooks [1989] , at p.885.Temkin (1987), p.51.

[102] Lord Denning, (1980) . at p.201.

[103] See Rosen-Zvi, A. (1988) , at p.112.

this view, which would pursue the strengthening of the family before any other aim, can be easily assumed.

As even ardent feminists have recognised that urging the abolition of marriage would be unrealistic[104] , the question would be what progressive changes could be realistically expected from the current system, including the extension of legal recognition to different types of households, relevant here in the context of rights of cohabitees. A new way of thinking may be required. Thus, a quick and easy divorce, ostensibly a perfect solution to the abused wife, has been recognised as a potentially subversive aim to the feminist policy[105] , as divorce reforms should not facilitate the man's departure while systematically ignoring the woman's inferior emotional, social and financial position, that would only deteriorate following the divorce. This is yet another fundamental difference between feminist and liberal policies.

Regarding Israel, the relevance of changing sexual mores to the law was exemplified by the now abolished archaic offence of "fraudulent pretence of marriage"[106], that had carried the maximum punishment of ten years imprisonment[107] . Further than the moral stand that separated it from other forms of deception, implied in the specific provision, it has been suggested that the endurance of this provision (until 1988) was yet another demonstration of the special position of the family, especially of the sexual intercourse between husband and wife.

Similarly, in the English law, impersonation of a man as the victim's husband has been one of only two situations were fraud was recognised as impairing consent[108] . Modern recognition of the importance of the sexual partner's identity, not necessarily a husband, led to criticism of the unjustified limitation of this exception[109]. Besides reflecting a growing sexual freedom, this stance promotes autonomy, one's freedom to choose partners, central to this discussion. The CLRC recommended extending the recognition in fraud to obtaining intercourse by impersonation of another man. [110] A little late perhaps, in *Elbekkay* [111], the exception has been extended to apply to a mistake regarding the identity of a partner.

Another pertinent point, especially in the familial context, when considering the bearing of

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[104] e.g. Smart,C., (1984), at p.225.

[105] e.g. :Olsen,F.E.(1993) , at p.70.

[106] CCO1936, s.359.

[107] Reduced by the Israeli legislator to seven years.

[108] SOA 1956, s.1(3).

[109] Ashworth,A. (1995) , at p.343.

[110] CLR C, 15th Report, para. 2.24-2.25.

[111] *Elbekkay* [1995] *Crim.LR* 163, approved in *R. v Linekar* [1995]3 All ER 69. However, for doubts about a possible regression due to s. 143(2) of Cr.J. and POA 1994, see: [1995]3All ER 166 (annual review).

gender, even if feminists have traditionally emphasised the violent and not the sexual side[112] , is the connection between rape and reproduction, mainly as some still view it as the central purpose of women[113] and as it has been argued that this female characteristic has been the ground for the legal interest[114] . This issue, again, bears on the ideological level a symbolic meaning entailing the factors of control and power, besides the more obvious technicalities, although surprisingly little referrence to it has been found regarding marital rape. Almost paradoxically, Temkin quoted sources who had thought that the "physical basis for equality", the availability of contraceptives and abortion (!), should have terminated the problem of marital rape, as women could have presumably left the house[115], but this was clearly either a very optimistic approach or just another attempt to ignore the complexity of the situation. Another, earlier, connection was made by Freeman, who argued that if motherhood was to be voluntary, then the right of the wife to refuse her husband sexual access was imperative[116]. Thus, attitudes towards marital rape have been affected by technical changes along with social changes concerning reproduction, which have been fundamental to the modern perception of the family. These changes may seem obvious now, but have actually evolved over time and have thus had a gradual effect.

Cohabitation and Domestic Violence

The social and legal status of cohabitees requires some discussion, as it has been evoked, by way of comparison, imploring equal rights for the wife. Furthermore, it is obviously related to changing social values the role of the traditional family.

The number of cohabitees was probably negligible at the time of the Common Law rule's establishment, but in recent times distinctions of principle and practice (e.g. questions of evidence, financial considerations, shame) between a married couple and cohabitees living together "as man and wife" are not easily justified. As seen, that was a main argument of the supporters of abolition of the exemption. Although the adverse view was not apparently prevalent, the notable exception is that of Williams, who recognised the modern tendency to "treat all unions alike, whether they are blessed or unblessed", consequently suggesting the exemption of cohabitees[117] .

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[112] Although there has been some controversy about this emphasis. See: McLean,S.A.M. (1988), at p.196 for a perspective that views emphasis on sexuality as dangerous, versus: Smart,C., (1989), from p.43, for a differently balanced strategy.

[113] See: Lord Denning, (1980), at p.194: "The principal task in life of women is to bear and rear children".

[114] Smart,C., (1989), at p.93.

[115] Temkin, J.(1987) , at p.41.

[116] Freeman,M.D.A. (1979) .

[117] Williams,G. (1991), at p.247.

However, while the position of a cohabitee was deemed to be better than that of the wife regarding marital rape, simply because the relationship was not classified as deserving a deferential legal treatment, in many other areas, mostly in family law, the cohabitee's position has been worse due to this relative legal listlessness, although changes have been observed[118] . The expanding social phenomenon has generated a growing socio-legal interest, largely based on comparisons to the status of marriage with its rights and duties.

Acknowledging the status of social relationships other than marriage would have opened the way for diverse forms of "alternative families", different from the ideal heterosexual nuclear family promoted so far, with its implications on the criminal law. In Israel, a controversial recent decision[119] expanded a collective trade agreement to include the partner of an employee (a homosexual) as a beneficiary. Although employment law was involved, not the criminal one, it is mentioned due to the willingness of the Supreme Court to interpret the term "a couple" widely, with the result of legal recognition (hence protection from discrimination) of alternative structures of social relationship. The moral stand behind the decision, made in a country where marriages and divorces are still governed by religious law, is significant. Although not quite acknowledging rights such as adoption of children, the decision nevertheless seems to surpass the partial and unsatisfactory 'decriminalisation'. Based on an argument raised by Sheleff[120] long before the homosexual movement gained any power in Israel, it is submitted that questions of substantial rights will make society face the moral issues raised by an ideology espousing the normalcy of homosexuality, much more so than in just tolerating the deviance, as done by the ostensibly liberal approach of the Wolfenden Committee. The gap between decriminalisation and socio-legal acceptance is clear. This argument may be relevant to any recognition of rights of couples who do not conform to the norm, homosexuals being just one example.

However, the central liberal premise of autonomy, free choice and the right of privacy may alter the picture, as many people's reluctance to enter into marriage may be based on unwillingness to expose themselves to legal intervention (assuming there is no legal impediment for marriage) dictating their rights and duties. Hence, justification of legal intervention may be theoretically precarious, verging on paternalism, although it seems less questionable where criminal law protection is concerned.

Domestic violence, an issue closely related to marital rape, is one problem that applies equally to married partners and cohabitees, including the rationale for categorisation as a particularly vicious form of violence. Assault offences have always applied, and the problems of police attitude towards domestic violence, presumably changing, has not been confined to married

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[118] see discussion in:Parry,M., (1993), from p.4.

[119] B"GZ 721/94 El-Al Israeli Airways v. Yonathan Danilovitz and the State Employment Court. mentioned earlier in the context of judicial legislation.

[120] Shaskolsky-Sheleff,L. (1976) , at p.209.

couples[121] . It has been indicated that cohabitation may mitigate the sentence in rape cases[122], just as marriage would, and it is similarly questionable . All the observations concerning spouses are therefore applicable here.

As most remedies have been awarded by civil law, the discussion will be brief. The mentioned Domestic Violence and Matrimonial Proceedings Act 1976, implying the growing social awareness both to domestic violence and to its occurrance in some quasi-familial structures[123] , facilitated the grant of the civil law remedy of an injunction by cohabitees. However, the protection is restricted to existing relationship. Despite the incomplete developments, in the late 80s it was asked whether too much political attention had been payed to various lobbyings on behalf of minority groups, including cohabitees (and homosexuals)[124]. Considering the long reign of the conservatives, coupled with evidence of the sustained popularity of marriage (despite the publicly acknowledged escalating divorce rate[125]), this debate exemplifies yet again the contemporary centrality of the 'normal' family.

Lord Mackay's recent Family Homes and Domestic Violence Bill which would have stretched the protection of cohabitees[126] , along with his proposal to enable quicker divorce (although introducing a requirement to attend mediation sessions[127]), have been severely criticised by several conservatives. Eventually, the government withdrew its support of the Lord Chancellor. Even the fraction of the original protection that survived in the later Family Law Bill[128] has been subjected to controversy. This refusal to adjust to changing social patterns is as far from the alleged new realism as could be, a view reflected in some reactions to those opposing the Bill, regarded as "living in a land of romantic fantasy"[129] and "forces of reaction"[130] , mentioning that Lord Mackay could hardly be accused of "trendy liberalism"[131] .

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[121] Parry,M., (1993), at p.179.

[122] *R v Berry* (1988) 10 Cr.App.R.13. See earlier extensive discussion of sentencing patterns.

[123] The protection is still limited to heterosexual couples, s. 1(2): "a man and a woman living with each other in the same household as husband and wife".

[124] See discussion of the gap between the political agenda and sociological research in this context: Finch J. & Morgan D. (1991) , from p.75.

[125] e.g.: O'sullivan,J. ,*The Independent*, 2 November 1995.

[126] A recommendation to the same effect was made by: Law Commission Working Paper No. 113: Family law - domestic violence and the occupation of the family home, 1989, para.6.3.

[127] See reference to the ambiguous attitude of the feminist movement to quick divorce reforms.

[128] See: Horton,M. [1996].

[129] Law Commission Working Paper No. 113: Family law .

[130] Gorman,T., *The Evening Standard*, 2 November 1995.Gorman's views are of particular interest as she herself is a conservative MP for Billericay.

[131] Gorman,T., *The Independent*, 7 November 1995.

Domestic Violence, Sexual Offences Within the Family and Protection of the Young

An important aspect of criminal law's intrusion into family life involves the problems of domestic violence and regulation of sexual conduct within the family. The legal expression of the social perception of the family have led to a gradual recognition of the different legal personalities within the family, each with his own rights and vulnerabilities. The "one flesh" idea, restricting legal personality to the husband, has been eroded in private law[132], and the criminal law intervention, responding in part to public outcry, has hesitantly followed. However, the situation is still far from ideal, and practical along with ideological dillemas that

have characterised marital rape are relevant in this context. Feminist theories, policy considerations and social views regarding every stage of the process, from the underestimated extent and prevalence of the phenomenon[133], to lenient sentences[134] , and allegations concerning police's unacceptable treatment of female victims have applied equally to domestic violence[135].

In Israel, although by 1979 the police issued an instruction that wherever a battered woman was involved, a criminal case would be opened, unless certain mitigating circumstances applied, a police research revealed that the attrition rate was nevertheless high[136] , comparable to the English police's still criticised attitude, despite years of Home Office guidelines[137] . The generally hostile police treatment has apparently been driven by the legal agencies' inclination towards maintaining the family unit[138] , the questioned aim at the basis of reviewed legal policies. Further similarity is in the excuses offered by the police, including alleged evidential problems and withdrawal from complaints[139] .

The issues of sexual abuse and domestic violence will be discussed together as they represent essentially similar disputes, especially given the mentioned feminist attitude towards sexual

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[132] Freeman,M.D.A. (1979), at p.333. However, there is some indication that the "unity" doctrine has not been removed from several matrimonil provisions: Parry,M.,(3rd ed.1993), at p.187.

[133] According to: Atkins S. & Hoggett B., (1984) , at p. 124.

[134] For an evaluation of the unsatisfactory American situation see:Waits,K. (1993), at p.205. See discussuion of alleged unsuitability of imprisonment in: Ashworth,A. (1995) op.cit., at p.355.

[135] Hayes,M. & Williams,C. (1995) , at p. 305. Even when the women stayed in refuges: Heidensohn,F., (1985), at p.57. Furthermore, research found a generally critical police and prosecution reaction to women who wished to discontinue the legal process, another point central to the marital rape debate : Cretney,A. & Davis,G. [1996].

[136] See Avni,N. (1990) , at p.176.

[137] See: Newburn, T., (1995) ., from p.155.

[138] Ibid. Avni based this conclusion on a research conducted in a battered women refuge.

[139] Ibid. at p.175.

offences as no more and no less than forms of violence[140] , dominance[141] , and control[142], thus elevating the issues of harm and structural explanations (as opposed to individual ones), not the relationship between offender and victim. The influence of this view seems to have reached Parliament, and was alluded to during the discussion of the broader definition of rape[143] .

The added element which has probably contributed to the different legal treatment is the victimization of children. This especially vulnerable group may well justify favourable discrimination. The legal situation has reflected the increasing awareness of young victims generally, and of child abuse within families, as serious social problems, in the last ten years[144] . However, evidential problems analogous to those regarding marital rape have arisen as children were traditionally accused of being liars[145] , generating questionable requirements of corroboration[146] or corroboration warnings[147] , which persisted until 1994[148]. Unsurprisingly, then, numerous feminists have campaigned for changes in this area.

As argued by Atkins and Hoggett, the reviewed assertion that the criminal law had no place in family relationships, could be similarly employed regarding familial violence[149]. Furthermore, it should be noted that besides the practical criticisms of the criminal justice system's treatment, even ardent supporters of women's protection have doubted the suitability of the criminal law, relying on perception of its concern with identifying and punishing criminals, not presumably helping to protect the woman against further assaults[150] . In Israel, this argument was considered and rejected by the Karp Committee[151] .

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[140] e.g. see: Lacey N., Wells C. & Meure D., (1990)t.

[141] This was the starting point to Dobash & Dobash's influential work on domestic violence: Dobash R.E.& Dobash R., (1980).

[142] Some feminist analysis presented the difference between female and male perceptions of sexual conduct as expressed equally by any manifestation of male violence (whether rape or making obscene remarks)e.g. Cameron & Frazer as cited in: Lacey N.,Wells C. & Meure D.(1990), at p.323.

[143] Per MP Alan Howarth, Parl.Deb.,commons 1994,vol.241, op.cit, at col.177. Note the inclusion of the issue into a Criminal Justice Bill and not a Sexual Offences one.

[144] Ashworth,A., (1994b), at p.37. The question of 'protecting' young people from homosexual acts was discussed separately.

[145] See: Edwards,S. (1990),at p.152.

[146] Dispensed with by the Criminal Justice Act 1988, s. 34(1). For a general assessment of corroboration rules see: Uglow S.,(1995),from p.196. It may be briefly argued that even if a real need for corroboration exists where there is a single source of evidence, the law should apply to all cases and witnesses equally.

[147] An equal requirement to all sexual offences, based on this assumption of lies.

[148] Criminal Justice and Public Order Act 1994, s. 33.

[149] Atkins S. & Hoggett B., (1984) , at p.81.

[150] Hayes,M. & Williams,C. (1995) , at p.306. A similar portrayal of the criminal law versus family law was the starting point of: Law Commission Working Paper No. 113: Family law - domestic violence and the occupation of the family home, 1989.

[151] Karp Report (1989), Ch.B8.

Just as marital rape has been compared to 'real rape', domestic violence may be compared to 'real violence', that is, outside the family. One example of the different perception is compensation to family victims by the Criminal Injuries Compensation board. While family members had been excluded for a long time, compensation may still be reduced today because of victim's conduct or way of life, and prosecution is usually a prerequisite in those cases only [152]. Since evidence of the seriousness of abuse has accumulated, comparable if not worse than many other legally condemned forms of violence[153] , the persistence of this question shows an unjustifiable degree of tolerance towards family violence[154] , comparable to the stance exemplified by lenient sentences for marital rape. A separate question is whether the criminal law is the best way to encounter cases involving children, considering the possibility that the defendant may be acquitted. As this second question rests upon the psychological trauma of the case (the nature of the criminal process) and not on the role of the criminal law, they should not be confused.

Despite the similarity, domestic violence had been treated by the law earlier than marital rape, implying the added significance of the sexual element, although not early. In England, wife battering was recognised as worthy of formal intervention only in the 1970s.[155] The first statute specifically confronting this problem was enacted in 1976[156] , concurrently with the statutory definition of rape. The effective implementation of the law is questionable. The statistics, as concerning marital rape, have shown a far smaller number of reports or prosecutions than the estimated 'dark figures'[157] .

In Israel , by comparison, the first official Committee that encountered the legal aspects of violence between spouses was appointed in 1986[158] , against a background of a widespread recognition of the problem by social services, the police, and, perhaps mainly, women's organisations, who had already established refuges. The same problems, including the uncertain extent of the phenomenon[159] , were encountered and the recommendations were implemented in

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[152] See discussion in: Atkins S. & Hoggett B., (1984) , at p.134. And see discussion of the 'not deserving' victim in: Mawry R.I. & Gill,M.L.,(1987) , at p.49.

[153] e.g. Such a view, identifying the special social danger of the phenomena, resulting from the pattern of violence and from the long term influence on the children, was expressed in Israel in the Karp Report (1989), ch.B3.

[154] Following an accusation of the American society made by Kathleen Waits: Waits,K. (1993).

[155] Temkin, J.(1987) , at p.41.

[156] Domestic Violence and Matrimonial Proceedings Act 1976.

[157] Edwards,S. (1990),at p.156.

[158] The Karp Report, (1989).

[159] The Karp Report,(1989), Ch.B s.3 deals with the "conspiracy of silence".

1991, in The Law for Prevention of Violence Within the Family.[160]

Incest and sexual abuse of the young

As seen, protection of the young from exploitation has been crucial to criminal law policies[161] , inside the family home or, more often, outside it. It was, for example, shown that a rare consensus has existed concerning procuration offences. Recommendations purporting to protect the vulnerable have generally attracted a wide support, even though justification has been questioned occasionally, depending upon approval of paternalism under the circumstances.

The extended Israeli law concerning sexual offences within the family[162] has been mentioned. In order to protect the young as far as possible, "members of the family" have been covered, widely defined as including common-law spouses and ex-family members[163], and the age of the protected raised. The maximum severe sentences embody grave condemnation. In England, incest, which may be consensual where adults are involved, is regarded as a serious offence, although it has been limited to members of the nuclear family.[164]

Emanating questions concern the necessity of a separate offence for incest, implying the unique character of offences within the family, and the extent of protection. As argued earlier, this characteristic casts an exceptional severity on the acts. Similarly to marital rape, the emotional side, the broken trust, adds to the immense harm. A comparison to rape, particularly marital, will also highlight the irrelevance of formal consent in situations where power inequalities are likely to abate any resistance. The early legal recognition[165] is therefore justified, at least where one of those involved is under the age of consent. However, following the pursuit of sexual autonomy throughout this account, it may be argued that behaviour of consenting adults should not have been criminalised, in analogy to claims pertaining homosexuals. In that respect, the Israeli formulation, although still setting a higher age limit than the age of consent[166], fulfils better the aim of protecting the vulnerable without unnecessarily breaching adults' autonomy.

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[160] The Law for Prevention of Violence Within the Family 1991.The main improvement is the creation of a "protection order", which would be issued following a reasonable assumption of a future sexual offence (s.3).

[161] See a review of the law criminalising sexual intercourse with adolescent girls and incest in: Zedner,L. (1995), at p.179.

[162] Penal Law (Amendment no.30)1990.

[163] Compared to s.10-11 of the Sexual Offences Act 1956, where the relationship should be of first degree but there is no age limit.

[164] SOA 1956, s.10, 11, sch.2.

[165] Punishment of Incest Act 1908. See discussion in: Ashworth, A (2nd ed.,1995),at p.339.

[166] The age limit is 21, identical to the 1984 CLRC's recommendation in para.8.22. See separate discussion of the age of consent.

It has been suggested that protection of the young and supposedly vulnerable may be construed as rather paternalistic. In England, while wives had been denied access to the law for a long time, young girls had arguably been excessively protected. Williams, analysing the offence of "unlawful sexual intercourse", concluded that the object of the law was to save young girls from their own experience, and presumably to protect the interest of parents in having a chaste daughter. The law consequently disregarded questions of justice and social policy while being preoccupied with questions of age.[167] This view of the law's motives certainly corresponds with the analysis of the marital rape law and explains what may be initially seen as an inconsistent criteria for intervention. An indication of the seriousness with which sexual offences involving minors have been regarded is the judicial propensity to impose protective sentences, longer than the term which is commensurate with the seriousness of the offence, under the Criminal Justice Act 1991, whether the offence was committed within the family[168] or not[169] .

Provocation? Self-Defence? Diminished Responsibility?

Empirically, an almost exclusive link between spouse killings and domestic violence has been established[170] . The questionable suitability of legal defences and their desirable extent in spousal homicide cases is relevant to this discussion, either when the defendant is a battered woman responding to continued and anticipated violence, or a husband who killed his spouse and pleads provocation, as the element of justification involves moral judgements, especially when a legal reform has been pursued.

Without debating the very acceptability of defences, this issue, particularly regarding female defendants, which has generated a debate in recent years[171] , will be mentioned briefly, in order to highlight the connection between legal defences, domestic violence, and the discussed gender presumptions. Thus, Bandalli's study of spouse killings showed that regarding a female victim, it was her matrimonial behaviour that became the focus of the provocation defence[172] , similarly to the discussed allocation of responsibility to the 'precipitating' rape victims. The responsibility of the defendant was reduced by the presumed faults of the wife. Consequently, the

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[167] :Williams,G. (2nd ed. 1983) ., atp.240. And see the Law Commission's Draft Criminal Code,s. 111,114-115, criticised in: Hall,J. [1996].

[168] S.2 (2)(b) of the Criminal Justice Act 1991 e.g. *R v L* (1993) 15 Cr.App.R.(S.) 501, *R v S* (1994) 16 Cr.App.R.(S.) 303.

[169] e.g. *R v Bowler* (1993) 15 Cr.App.R.(S.) 78, *R v Kennan* (1995) 16 Cr.App.R.(S.) xxx, where the attempted rape victim had been a sixteen years old prostitute, and the Court of Appeal, in maintaining the severe sentence, emphasised her age and not her profession.

[170] See studies in: Hayes,M. & Williams,C. (1995)at p. 305. A similar link has been found where the woman was the abuser: Dobash R.E.& Dobash R., (1992) , at p.271.

[171] e.g. The case of Sara Thornton whose life conviction for murder after suffering abuse was quashed by the Court of Appeal. See later reference.

[172] Bandalli, S. , (1995) .

correspondence between the assumed duties of the wife and the extent of the legal acceptence of the defence (a link that was essential to the discussion of marital rape and legal protection of battered women), with its sexual politics implications, has been a natural feminist battle ground[173] .

Ostensibly, it is the "reasonable proportionality" that would determine the case, as when any other provocation or self-defence is pleaded. However, it has been argued that the assumption of an immediate proportionality has been based on impulsive male responses[174]. Furthermore, several American courts have recognised the "battered woman syndrome"[175] . Potentially, it could be viewed as one of the accused's own characteristics allocated to the "reasonable man" that would affect the gravity of the provocation[176] . Alternatively, it could be classified among 'mental peculiarities' that would justify pleading diminished responsibility rather than provocation, as they affect the power of self-control[177] . Two English sources for the relevance of this syndrom to jury consideration are *R. v Thornton* [178], and the obiter dicta in *Ahluwalia* [179] . The plea may be regarded as contradicting the discussed efforts to divert the perception of women (and other legal actors) as psychopathologically motivated. If it is presented as a defence peculiar to women, and not simply awarding an equal protection to that of men, it could be seen as sustaining the stereotype of the weak, hysterical woman. However, sceptics such as Bandalli considered the defence to be too masculine oriented to be of much help to battered women anyway[180] . Furthermore, it has been recently argued that the validity of the dicta in *Ahluwalia* has been doubted following the decision in *Morhall* [181] , as the provocation there was not directed at the charasteristic, and any evidence regarding the subjective control of temper has been made irrelevant[182] .

As with the other discussed issues, the message behind the legal facade is important, the endorsement of a male pattern of behaviour and the denial of the female equivalent, thus enforcing a biased moral stance. Amending the scope of the defence, whether partially or fully, would have involved a readjustment of the moral basis, a new quantification of culpability. The

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[173] e.g. Edwards,S.(1985a), from p.190.

[174] e.g. Wasik,M. [1982], at p.35. And see criticism in:Horder,J. [1989], at p.553.

[175] For American and Australian sources see: Graycar,R. & Morgan,J. (1990) , from p.407.

[176] According to the individualised standard ofgravity (along with the general standard of self-control) as endorsed in: *R v Morhall* [1995] 3 W.L.R. 338 following *DPP v Camplin* [1978]A.C. 705.

[177] As analysed by Horder in: Horder J., (1996)1.

[178] *R v Thornton* , (no 2)[1996] 1 WLR 1174, [1996]2 All ER 1023, [1996]2 Cr.App.R.108.The Court of Appeal nevertheless emphasised the need to prove a sudden and temporary loss of self control.

[179] *Ahluwalia* (1993) 96 Cr.App.R.133.

[180] Bandalli, S. (1995).

[181] *R v Morhall* [1995] op.cit..

[182] Horder J., (1996), at p.37.

"contemporary attitudes of sympathy towards the defendants"[183] are, in essence, changing modern mores. The very acknowledgement of domestic violence as a category deserving of a serious discussion is comparable to marital rape in its invasion of protective privacy, previously presented as the ultimate hurdle, and the departure from enforcement of female physical subservience.

In Israel, where a similar public interest in spousal murders has grown, a particularly interesting voice in the debate has been that of Shuki Basso, a soldier who killed his father after suffering and witnessing years of domestic abuse. Basso wrote from prison to a prominent Israeli philosopher, Prof. Assa Casher, endorsing Casher's objections to mitigated sentencing policy in similar cases[184] . The ground for Casher's stance has been the absolute moral fault of murder as a solution to human problems and the need to eradicate this kind of resolution. But, can it be validly asserted that "murder is murder"? The long term existence of several defences suggests that it is not so. If those defences can be shown to rest on primarily male patterns of behaviour and thinking, as submitted, a change that would incorporate female behaviour into the law would be expected, not interpreted as excess compassion. The general moral fault of manslaughter is mitigated by other moral considerations, specific to the case and to the individual. Thus, the strict acceptance of defences (or their abolition) as a consequence of Casher's stance would not be in any way more moral or justified than the current situation. On the contrary, the long recognised personal culpability that should be weighed by the criminal law in order to achieve personal justice[185] ,would be undermined.

The male orientation of the defences to murder (and the construction of the "reasonable man"[186] with its professed objectivity) has been raised recently in the States regarding the defence of provocation by homosexual advances, interpreted as accepting that "men will be men"[187] . This may well be the most blatant example of incorporating heterosexual male moral assumptions into the criminal law, reinforcing preconceptions regarding the culpability of homosexuals and accepting male aggression as natural. Sadly, observations that male homosexual conduct and female prostitution retain an informal criminal status even following decriminalisation[188] seem to explain as well as to be sustained by this situation. Thus, the comparison of a certain judicial acceptance of defences in marital abuse cases and in homosexual advance cases may suggest that the authorities have shown an overall unjustifiably lenient tendency. Reconstructing the

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[183] Wasik,M. [1982].

[184] Casher,A., *Ma'ariv,* 27 October 1995.

[185] Dressler,J. (1995) ,at p. 751.

[186] Homicide Act 1957, s.3.

[187] Dressler,J. (1995) . See Dressler's observations regarding the different way in which men and women react to violence, p.736. Dressler has supported the defence, justifying it by interpreting the "reasonable man" as an "ordinary man" allegedly non-homophobic and yet affronted by the advances to a degree that would justify violence.

[188] Lacey,N. (1995), at p.22.

defences and the attitudes behind them inevitably leads to conclusions about society and the values that motivate it and are endorsed by it.

Religious Moralism

Conservatism and Religion-based Moral Values

Religious morality is one area where a difference between England and Israel has been anticipated. Different ways of religious influence have been detected, including a manifest political way, unique to Israel, and a more covert and indirect influence, often expressed in judicial reference to traditional Jewish law and values, which have functioned and been perceived as a normative foundation, irrelevant of political power. It is hence analogous to legal use of any moral stand, comparable in a sense to the English situation.

Despite the entangled values, mainly where family and sexuality are involved, an analysis has often discerned the religious origins of popular views. The importance for this account is the persisting conservative moral stands, even in the so-called 'permissive' era, often expressed in the belief that legislation is linked with "loss of values" or "social deterioration"[189] , leading to condemnation of any step that would appear to be decriminalising an abhorred conduct. Hence, this study supports Newburn's observation[190] and goes even further to suggest that the use of a term such as 'permissive' to describe the legal changes of the era, extensively used in England and Israel, is at best simplistic, if not misleading. This, despite Newburn's observation of a process of secularisation in Post-war Britain as a major factor[191] and his analysis of 1960's legislation as reflecting a limited acceptance of moral pluralism. Later legislation has seemingly pursued more conservative values, an observation substantiated by political changes, even if the absence of obviously Christian mores from legislation has persisted.

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[189] See discussion of similar religious and conservative reactions to prostitution in Israel.

[190] Newburn, T., (1992) , at p.158.

[191] Newburn, T., (1992) , from p.173.

ndirect religious influences have been noted regarding legal condemnation of homosexuals[192] . The reformative and rehabilitative aim, occasionally directed at prostitutes, is another example. This penal policy has apparently been guided, since the Victorian era, by the religious -moral belief that a paternalistic approach would improve the offender[193]. The notion of "redemption", clearly indicating a severe moral fault that may be repaired, has not been abandoned, despite changing attitudes toward rehabilitation, in England[194] and in Israel[195] . The resulting paternalism towards prostitutes[196], was compared with mitigated legal reaction towards those to whom a lesser moral fault has been attached, be it the prostitute's customer or the raping husband. Another example has concerned the legal treatment of the ponce, based on his perception as corrupted beyond repair[197] .

If any religious source of the moral values implied in the Wolfenden Report could only be speculated, in the context of marital rape some direct suggestions were found, although scattered. The reason is probably the direct link to the family, an institution traditionaly dealt with and promoted by religious discourse[198] . Some modern legal reference to religion in this context has been done by way of historic accounts, whether explaining Hale's rule[199], or the general position of the Christian Church, which has always insisted on the obedience of a woman to her husband, and the canon law that translated the precept into a legal obligation.[200]

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[192] See discussion in the chapter dealing with homosexuality.

[193] See: Shoham,S.G. and Shavitt,G.,(1990) .

[194] e.g. H.O.(1974) op.cit. para.249, a recommendation to leave the cautioning system intact, despite its recognised failure, as there was still some unfounded hope for it to function as a framework for redemption.

[195] As expressed in the 1992 Bill's proposal in S7(op.cit.) to provide that it would be an offence to act maliciously in a way that may obstruct treatment or rehabilitation of a person who practised prostitution, despite disillusion with this aim .

[196] e.g. See the offences of procuration of adult females and of males, and the foregoing criticised resistance to introduce any change concerning them by the CLRC 1985 Report, para 4.4, para. 4.14, and in Israel regarding S.2 of the 1962 Law, S.201 of the 1977 Penal Law, as well as the 1992 Bill. Additionally, see the Israeli offence of Instigation of a woman to carry on prostitution, S. 3 of the 1962 Law, S.202 of the 1977 Penal Law.

[197] See the mentioned Knesset debate of severer punishment , where prominent among the considerations was the perception of him as "a professional" , without mitigation .D.K.1962, p. 1925.

[198] e.g. The lasting control of the religious court in matters of marriages and divorce in Israel was referred to previously. See: Barton,J.L. (1992), at p.266-267 for some referrence to religious influence on English matrimonial law.

[199] Barton,J.L.(1992), at p. 263 explained the eccelesiastical background for Hale's rule, thus defending him against modern accusations of misoginy.

[200] See discussion in: Lord Denning, (1980) , at p. 196-197.

he emphasis has thus been on the presently perceived culpability, and its legal expression, but cknowledging the continuity, the historic religious origins, and the effect of the lessening elief. However, referrence to canonist law becomes more difficult and the relevance less ustified if modern decisions are validated by it[201] or if the criminal law is thought of as the roper means to pursue religious values[202] , just as any other purely moral justification would ave been rejected. This undesirable osmosis of values and their inevitable consequences which may easily explain lenient sentences for marital rape or the quest for alternatives to bolition) may be the result of accepting axioms such as Lord Denning's belief that civilisation vas built upon a sound family life for which the only basis was a Christian marriage. Since ccording to the Christian doctrine, as explained by Lord Denning, there should be no divorce, he inevitable implication would be the prioritising of reconciliation as a supreme value, a value hat has been the essence of the traditional Jewish law[203] .

While this criticism is undeniably justified in the pluralistic, multi-cultural British society[204] , it eems just as relevant to an ostensibly democratic state such as Israel. A complex picture of the elationship between legislation and religion-based morality emanates from the study of the sraeli legal situation. Contrary to the equalisation of groups in English society[205], a constant estructuring of power relationships has been noted in Israel, to the point that the power of the eligious groups has grown considerably in the last elections (May 1996), due to political nanoeuvres, exceeding their relative percentage in the population, hence immediately raising pprehension of inflicted religious values. Considering transient moral standards and shifting egal borders, it should be remembered that the process could go from permissiveness to onservatism.

The complexity may be the result of the Israeli society being less pluralistic, since Israel has leclared itself as "A Jewish state for the Jewish

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[201] In his article (1992), Barton justified decisions in *Miller* and *Steele* according to canonist law nd reviewed *R v R*.

[202] See criticism of the Lord Chancellor's attitude to a divorce reform, based on the Christian view of narriage, in:Bainham,A. (1995) , at p.235.

[203] See Rosen-Zvi, A. (1988) , at p.118.

[204] See ibid.

[205] Newburn, T., (1992) , at p.160.

people"[206], and although the constitutional value of this declaration has been debated, the separation of the spheres has never been taken for granted, coercing a very definite religious identity onto a largely secular society. Although this is necessarily a simplistic version, it conveys both the unusual power given to organised religion in an otherwise modern country and the important place that Jewish concepts still occupy, not only as underlying concepts, but as binding norms. This status was re-established recently in constitutional legislation[207] . Consequently, the gap detected by Newburn between the 'dominant value system' and traditional Christian beliefs can not be described as such regarding Israel. There always has been a certain correlation between the two, to varying degrees.

It does not necessarily follow, however, that a greater degree of consensus may be inferred concerning Israel. Although even the majority of the secular population holds, according to surveys, some "traditional values", the continual conflict between groups which hold different moral convictions, characteristic of modern society, is just as evident. Moreover, the conspicuous religious influence has led to fierce controversies, particularly about women's positions, as noted, spreading the debate about enforcement of a particular morality beyond legal circles.

As surprisingly similar norms have been legally established, despite this major difference between the two societies, it may be suggested that the values that have been advocated, especially promoting the family and heterosexuality, are so deeply ingrained that they have transcended the religious context. The utter resistance to change in certain areas, despite numerous proposals, and the similar diversion of both systems from legal principles, may indicate that transient moral standards have been less relative or localised than could be presumed, less fluctuating than assumed by some[208] , that the 'new morality', despised or hoped for, has not penetrated yet to the heart of the establishment, the legal system, at least regarding

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[206] As stated in The Declaration of Independence, 1948.

[207] See the discussed Basic Law: a person's dignity and freedom, op.cit., which has set "the values of Israel as a Jewish and democratic state" as factors to be considered in legal interpretation . The tension between the democratic element and the religious one had probably escaped the legislator at that stage or, more likely, it was ignored in order to gain a wide parliamentary support for the constitutional law.

[208] e.g. see Shaskolsky-Sheleff,L. (1976), at p.210.

ıore traditionally evaluated sexual conduct. A similarly shifting morality, too, has been xpressed through comparable legal changes, including the relinquishment of the marital rape xception, the growing intervention with domestic violence, the attempts to mitigate the legal utcome of spousal homicide under certain circumstances. The more significant difference etween Israel and England appears to be the influence of the organised, political religion.

)rganised political religion

t should be noted that as interest here has been with the question of enforcement of morals in a emocratic system, the desirability of the religious coercion on a largely secular society from the eligious agents' point of view, has not been discussed. Suffice to say that despite the obvious ttempts of the religious parties, this angle too has not been clear of doubts[209] , supporting the iew that separation of state and religion would benefit everyone.

)ne of the prime examples for judicial moralism demonstrated the use of religious law by the upreme Court to ensure the raped wife's rights[210] , long before it was achieved in England[211] , hrough a similar exhibition of judicial creativity, although less pronounced. Elsewhere, owever, especially where religious intervention has been a legislative one, it has been done in rder to impose a traditional male-oriented morality, or to impede allegedly corruptive egislation. The religious parties' objections to liberal proposals regarding prostitution laws, and ıe unique position of religious courts in matrimonial matters, have been studied. The religion-ased matrimonial law has arguably contributed to the animosity between the parties[212] and ence to the ocurrance of violence, even if Jewish law has always condemned spousal violence, s seen about marital rape, or domestic violence[213]. A difference arises between religion as a asis for moral beliefs which may, or may not, affect the legal process, and may be evaluated as ny other moral set, opposite religion as a political power, hence political interest, carrying the haracteristics of any other political group, including the constant need to reaffirm its public

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[209] See Maoz,A. (1992), at p.281.

[210] In Cr.A. *Cohen v. The State of Israel*, op.cit.

[211] Referring, of course, to *R v R*, op.cit.

[212] As recognised by the Karp Committee.

[213] See The Karp Report, Ch.B s.6.

redit by an impetuous pursuit of its aims. While the indirect or selective adoption of religious deas, by a system that generally conforms to legal rules, evokes questions concerning the ustification of enforcement of morals not substantially different to those that are raised elsewhere, the direct political coercion poses a threat to democracy.

The rift between the religious parties and the Supreme Court has increased considerably, to the extent that life threats have been directed at the Chief Justice, Barak. The heated debate [214] has promoted general criticisms regarding Barak's "legislative activity"[215]. Another Judge, O. Aligon, has claimed: 'we have become a marked target to parasites for whom the rule of law is alien'[216] . Religious fanaticism has been a recurring theme in this account, emerging from Knesset discussions, expressed in the quest to apply the criminal law wherever moral wrongdoing was involved. Unfortunately, while the overall picture has been of an enlightened and independent Supreme Court, that has striven to impose the rule of law[217] and to follow humane notions, perhaps too ardently sometimes[218], one fears that it may become an isolated institution in an ever more orthodox governmental system. The immense discrepancy between modern state and religious archaic laws has already been observed concerning the religious regulation of matrimonial matters[219] .

This situation is disheartening not least because it means that, according to the worst possible prediction, principles governing the proper scope of the criminal law, particularly guidelines for ustifiable criminalisation of immoral acts, may become extinct. Thus, the democratic process will in effect lead to the most undemocratic results imaginable. It is most evident, of course, egarding the contents of legislation. Raz, for example, has emphasised the role of democratic

[214] The immediate reason was a decision regarding the closure of a road, exemplifying the Israeli rend to transform political policy questions into legal issues, probably a side effect of the over-reliance on the judiciary , directly linked to the over reliance on the legal system as the be all and solve all.

[215] See : "Now a curse is threatened to be directed at Justice Barak" *Yediot Aharonot*, 30.8.1996.

[216] Ibid.

[217] Although for a general critique of the adequacy of courts as a central notion to the application of he rule of law in a pluralistic society see: Raz J., (1994), from p.356. It is mentioned as the issue of the ule of law in a society with changing values has been another theme traced in the foregoing account. However, even Raz, in p.362, recognised courts role as guardians against hasty legislation.

[218] Referring to the criticism of the use of Jewish law in the case of marital rape.

[219] e.g. see discussion of recognition of 'common law spouses' necessitated by the impossibility of eligious marriage for many people: Shaskolsky-Sheleff,L. (1976), at p.207.

egislation in a pluralistic, changing modern society . Mentioned Parliamentary and Knesset iscussions exemplified the extent to which legislation, mainly in matters involving a sexual spect, has often been based on emotion and sentiment rather than reason, even without the dded religious pressure. The judicial ability to accommodate reason into the existing structure, nd the trust of this authority, have been invaluable. The grave implications of abandoning the ule of law in this process may hardly be overestimated. The 'spirit of restraint and willingness o compromise'[220], the first demand from a democratic government, and thus the foundation for he rule of law, seems to have disappeared once political power has grown.

Jnfortunately, Raz's second criterion, too, the culture of legality, has been observed as largely nissing from the Israeli society even before the recent religious triumph[221] . Rosen-Zvi's sombre llegation about the lack of culture of law in Israel, coupled with the current struggle to keep the Supreme Court intact, all contribute to a picture of a fragmented and polarised society. The ituation is reminiscent of the crisis of political legitimacy and hegemony in 1970s Britain as lescribed by Hall[222] , although in Israel the problem is not so much a class struggle, but a eligious group struggle. Following Hall's argument, the result may be a law coerced rather than onsented to, which would make the current discussion all the more poignant.

As seen, criticisms of judicial activism, whether regarding marital rape or conspiracy to corrupt ublic morals, relied on established legal principles and the democratic tenet of separation of owers. Whether one holds that the courts have indeed trespassed their limits, or not, it is nthinkable that a valid criticism would be based not on these fundamental legal notions but on ome moralistic, religious view, unaccountable to any rational argument[223] , while the mportance of a legal conceptual framework has been stressed throughout the study.

All this raises another question, the de-centralisation of law, pursued by several feminists. It eems that under such a social struggle, visibility of alternatives and opposing groups is more

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[220] Raz J., (1994) , at p.361.

[221] Rosen-Zvi, A. (1993). Rosen-Zvi's notion of 'illegalism' of the Israeli society has been reviewed.

[222] See:"The Law and Order Society: the Exhaustion of 'Consent'" in *Policing the Crisis: luggings, the state and law and order* (1978) , at p.319.

[223] For the imprtance of legal rationality coherence see: MacCormick,N., (1978, 1994ed.).

ıdispensable than ever to maintaining a democracy. Furthermore, subsequent to the battle gainst it, the Supreme Court has evidently attained an unprecedented authority, a public 'isibility and power that it had never acquired, as the debate about the Court's power and, ndirectly, about legislative adjudication, normally confined to the legal realm, has become ›ublic. Although the finer points have naturally been abandoned in favour of the more populist ınd appealing ones, at least it has seemingly achieved the democratic ideal of public exposure.

Epilogue

Summary and Conclusions

The shifting borders of the criminal law in several spheres, in two very different societies, have been traced, through their relationship with social changes. A major issue imbued by morality has been the way in which social perceptions have been interpreted and given a specific meaning in the law. Recognising this, the distinct offences have been viewed in the broader context of violence against women, victimization, offences within the family, and sexual regulation in society, helped by social legal theories, particularly of feminists or radicals.

All the analysed topics have presented conceptions of the appropriate scope for legal intervention, and demonstrated the legal treatment of several societal sections, each with its burden of stereotypes. These have ranged from the potentially respectable punter to the despised ponce and the sometimes pitied prostitute, from the raped wife to the excused husband and their surrounding family, from the young, presumed to be vulnerable, to the homosexual, often seen as capable of corrupting.

In both jurisdictions the majority of legislators still conforms to the stereotype of the male, middle or upper class, heterosexual, older, presumably of an ethnic and religious majority. So do other practitioners in the justice system, mainly judges and lawyers[1] . Thus the legal assimilation of all these factors: gender, class, economic situation, religion, sexual orientation, influenced by the particular make up of the ruling classes (in the political meaning), has been questioned, following Smart's endorsed suggestion that moral codes and legal statutes originate in a specific structural context in which the distribution of power is significant in determining the form and content of the moral or legal code[2] , although the analysis has not been restricted to gender differentiation.

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[1] See Heidensohn,F., (1985), at p.34.

[2] Smart,C. (1976) , at p.89.

)espite cultural, political and economic differences, the comparison between England and Israel as shown similarity in the legal treatment of the discussed groups, along with the attitudes)wards them as have been thus reflected, including significant similarities in the movement upporting the extension of the legal protection regarding familial violence, illustrating how the aw may contribute to social change, as well as be motivated by it. On the other hand, the raditional norms of heterosexuality and family values, the threat of 'the other', have been ecured at the core of the legal system as well as society, shown as transcending any religious onnotation. This likeness was less surprising regarding the reviewed British Mandatory rovisions, where similarity was intrinsic, much more so regarding independent Israeli egislation and adjudication.

Besides the obvious, most blatant enforcement of morals, achieved by statutory proscriptions of ertain acts [3], many other legal devices, often subtler, were analysed as capable of reflecting orms. Among them have been particular elements of legislation such as the use of certain hrases[4] , presumptions[5] , safeguards[6] and sentencing policies[7] . Proposals for legal reform and lternatives have been central, as revealing the penetration of ideas formerly thought of as adical into mainstream thought, even if in a mitigated form[8] . Furthermore, their rejection has

[3] Including the conclusion that prostitution itself has been very much proscribed, despite the rofessed principle of not criminalising the act itself.

[4] e.g. See discussions of the continuous use of the derogatory term "common prostitute", since he Wolfenden Report op.cit. para.259., through s.1, SOA 1959, until the recommendation for bolition in the CLRC1984 Report, op.cit., para. 17, leaving the questionable term "being a prostitute" ntact.

[5] e.g. See analysis of the presumption of living on the earnings of a prostitute in England and Israel.

[6] See account of the introduction of unequal 'safeguards' designed to make certain offences lmost impossible to prove, e.g. 'nuisance' , 'annoyance' and 'persistence', see abolition of nnoyance' regarding soliciting by the Wolfenden Report op.cit. para.274 against the unsuccessful ttempt of the Sexual Offences Bill 1990, op.cit. to repeal persistence regarding kerb-crawlers in order) make the rarely used offence easier to enforce. See discussion of the objections to the introduction f the same safeguard into soliciting by a prostitute.

[7] Mainly through the example of the continuous use of imprisonment, regarding solicitation ffences, from the Wolfenden recommendations to the ostensible abolition in 1982. See debate egarding the severe penalties prescribed to those living on the earnings of prostitutes, even harsher Israel, imprisonment being made mandatory.

[8] e.g. See analysis of influences that brought the relatively radical proposals in CLRC 1982 Working aper, regarding the normalisation of prostitutes' lives, later retracted.

often been as indicative of a normative system as an implementation would[9] . One such example concerned alleged difficulties of proof, often shown to be ungrounded and employed selectively, only where legal intervention was deemed undesirable[10] . The less formal level of legal discrimination has been expressed through the criminal process, including sentencing and law enforcement agencies[11], often when infringing constitutional principles[12].

A complex picture of competing political and theoretical forces has been portrayed in the attempt to ascertain the criminal law development. On the whole, the comparison between the English and Israeli systems has indicated a similar polarised process of returning to right-wing, conservative[13] (religious, in Israel) values pursued on the political level, with some of the interventionist legislation done under a pretence of progress and supported by ostensibly liberal groups. Contrary to the Radical Criminologists' earlier observations, state control has grown.

However, the observed social diversification, offering a strong theoretical direction from groups outside the immediate legal process, with greater awareness of alternatives and radical solutions, justifies sustaining the debate about the proper scope of the criminal law. The alternative attitudes which have become more prominent or simply more visible, and have often been of greater interest than the obvious politically dominant morality, included religious, or otherwise conservative morality and feminist theory. The legal influence of both has demonstrated the inevitable connection between the legislation of morality and the appropriation of power, specifically political power. Furthermore, although groups that have been dominant in England, including feminists or prostitutes' organisations (perceived, as seen, to represent a feminist stance) have never been very influential in Israel, several examples were nevertheless brought of

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[9] e.g. See comparison of the prompt implementation of Wolfenden's recommendations in the Street Offences Act 1959, compared to the much delayed law allegedly decriminalising homosexuality.

[10] The first encounter with the arbitrary use of this argument was in Wolfenden's explanation to not criminalising kerb crawling: The Wolfenden Report op.cit. para.267.

[11] e.g. The commendable approach of the police to cafes and refreshment houses, mentioned in the discussion of the Street Offences Act 1959 against the criticised attitude towards complainants in sexual offences. The discussed decision of the Prosecution Service to indict prior to *R v R*.

[12] e.g. The Israeli Legal Advisor to the Government's directions not to enforce the law against consensual homosexuality and intercourse with an under-age girl under certain circumstances.

[13] Not necessarily only belonging to a conservative party. In Israel this seems to be particularly true, as the political identity has been classified according to policies regarding the peace process rather than any particular ethical inclination, apart from the religious parties.

not only similar developing theorising, but also the similar changing perceptions of women and family as expressed in the law.

Next, several of the themes that have stood out will be recounted, highlighting their possible relevance to further recently debated issues, bearing in mind that the general issues of the relevance of gender and feminist critique, sexual abuse of the young, the modern perception of family and marriage, and religion, have already been discussed extensively.

Setting the Guidelines-
From enforcement of morals debate to pragmatism

This account has spanned the different theories that have underlined or contradicted the legal activity. The first influential development was the debate about the enforcement of morals between Lord Devlin and H.L.A. Hart, including the ensuing theme of the harm principle. A doctrine that has been endorsed is that of Raz, granting supremacy to the ideal of autonomy, a point that was stressed especially regarding marital rape and the position of women[14]. The examples chosen demonstrated, then, the two extremes: crimes alleged to be victimless, and ignored incidents causing real harm, both theoretically debatable and both demonstrating very different (and changing) levels of legal respect of autonomy and harm.

The undesirable observed results of enforcement of morals have included disregard of human rights[15] and infringement of legal principles, starting with the principle of innocence, infringed by the biased term "common prostitute"[16], and continuing to frequent references to the principle of legality.

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[14] See: Raz J., (1986) , from p.412. Another aspect of his theory that has been relevant to this discussion is that the view precludes a definite opinion regarding paternalism.

[15] e.g. As exemplified through s.3 of the SOA 1959, that contrary to Wolfenden's recommendation proscribed gathering of prostitutes in cafes, without the pretence of preventing annoyance, thus severely restricting their activities. Also see extensive discussions of the offence of living on the earnings of a prostitute in case of a partner. In Israel: criminalising maintainance of a place for the purpose of prostitution even if the place was simultaneously used for her accommodation , *Turgeman v. The Legal Adviser*, op.cit.

[16] As concluded in the evaluation of the Street Offences Act1959.

Recent theories seem to have been more pragmatic, trying to accommodate a more realistic place for morality in the process. One such example is the "post-liberal" theory of Michael Perry[17]. Perry's critique of the liberal approach, of its failure to portray a morally neutral or impartial politics (and hence law), necessitates an alternative definition of the appropriate relationship between morality, politics and law. As all the evidence gathered here indicates that impartiality, when attempted, has been impossible to achieve, such a theory seems to be more in line with the facts. The pragmatic approach accords with the view that every person possesses some moral code, not just waiting to be allocated values[18] . The discussion, then, turns to questions of constraints and limitations, the desirable relations with the rule of law following from practical realisation that subjectivity will probably prevail.

It has been shown that the Wolfenden Committee itself did not always adhere to its professed philosophy, and that thereafter a gradual process of departure has continued[19] . Moreover, regarding some forms of sexual offences, legitimating enforcement of morality has been embraced even by adamant supporters of liberalism, and in cases such as the revolutionary verdict in *R.v R.*, temptation of supporting the judicial decision has been strong, although the possible conflict with the idea of legality has been particularly evident regarding legislative adjudication, indicating the strong effect of a changing morality on judges.

Practical considerations do not mean, however, that the conceptual framework sustained throughout this account should be abandoned in favour of a pragmatic outlook, principally the fundamental link between legal intervention, autonomy and harm. It will be exemplified shortly that assimilation of morality may lead to undesirable and unjustifiable results even when a 'new morality' is the subject, encouraged and promoted by feminist theories that have been generally supported in this study.

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[17] Perry, M.J. (1988). Especially see ch. 3: "A Critique of the Liberal Political-Philosophical Project".

[18] See: MacCormick,N., (1978, 1994ed.), from p. 265.

[19] See the discussed manifestation of desirability of moral guidance by the law , even between consenting adults in: CLRC 1985 Report, para 1.6.

Ever expanding intervention

ince one of the characteristics of the era has been awareness of the problem of expanding iminal legislation[20], and there appears to have been a strong jurisprudential support for iminution of the criminal law in certain discussed areas, mainly ancillary to prostitution[21],)undly justified new measures could be reasonably expected. However, Parliamentary iscussions in both places have tended to be rather superficial, similar to the media coverage in :sponding to the more sensational details[22], and legislative motives and consequences have had) be unearthed.

ıs the political climate of both countries in recent years has been rather conservative, punitive-ıterventionist policies may be construed as pragmatic, motivated by a calculus of benefits, by ıe endeavour for power as expressed in the frequent surrender to public opinion, leading to ıuch of the hastily drafted reviewed legislation, as opposed to policies that ascribe to onceptual frameworks, such that would have subscribed to an external ethical standard.

'he basic deficiency of the perceived public opinion has shown just how precarious leaning on is. The nature of public opinion, particularly as reflected through the media, thus of a limited nderstanding of the process, has meant that reactions would usually be directed at the more xtreme legislative provisions, often, as seen, unjusitifiably labelling it as 'permissive' or egalising'[23]. Furthermore, the media often being susceptible to the same power relations, it has ɔmetimes created the impression of a public consensus (crucial to the question of enforcement f morals) where it did not actually exist.

lowever, beyond the political need to be seen to be acting firmly, primarily through impressive

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[20] e.g. See Walker,N. (1987) , at p.139. In Israel: Shaskolsky-Sheleff,L. (1977) , at p.114.

[21] e.g. See proposed unification of the different soliciting offences, rejected in CLRC (1984) op. t., para.54.

[22] See discussion of the ignored provisions of the 1967 Act, those restricting homosexuality.

[23] See conclusions regerding the Wolfenden Report and the Israeli 1992 Bill.

criminal legislation, it seems that a large part of the public, including legislators, is apparently incapable of distinguishing between support for removing an act from the purview of the criminal law and support for the act itself, or can not grasp that a public condemnation is not always best expressed through criminal sanction. This simplistic approach, that does not take into consideration the suitability of the criminal justice machinery to certain situations or its limitations, does not seem to have improved.

One of the repercussions of the legal capability to impose moral values, coupled with the effect on everyday life of the expanding criminal law, has been an ever growing expectation from the legal system to reflect certain values, emanating not only from extremist groups pursuing farfetched targets. Various sets of expectations for social benefit brought through legal change, and their validity, have been examined. Recent public panics, such as the one in England concerning paedophiles, urging extreme legal measures (i.e. limitations of human liberties, regarding, once again, the control of sexuality and its link to violence[24]), affirm the relevance of the analysis. The relevance is enhanced by current public debates regarding other legal areas, such legal implications of advanced infertility treatments. Although the different legal context obviously raises other dilemmas, the basic theoretical arguments regarding the questionability of incorporation of morality into the law, particularly that concerning family values and gender roles, besides the immense, therefore politically effective, public pressure, have been comparable.

An over-reliance on the criminal law and its application as reflecting social norms, and exaggerated expectations regarding the judiciary's ability to advance society, can be concluded regarding both countries, opposite soundly grounded arguments for criminal law restraint, or principled criminalisation. This conclusion accords with Steven Goldstein's analysis of Israel in the mid-80s, which also found an over-reliance on the legal system as a whole, compared to other social systems[25] .

In both countries, against many instances of criminalisation and deepening legal intervention,

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[24] See discussion of similarly severe criminal measures suggested in regard to controlling AIDS.

[25] Goldstein,S. (1983-84).

the only decriminalised conduct has been consensual homosexuality between adults. The accuracy of the dictum that it is far easier to make than to unmake criminal laws[26] , has been repeatedly demonstrated. Note, for example, the assiduous but largely unsuccessful campaign for allowing prostitutes more humane conditions[27]. Furthermore, even the allegedly decriminalised acts, which have been permitted only under strict conditions, may not be progressive, since the question regarding immorality and criminal law is left just as pertinent[28] .

Several examples were brought where non- criminal measures might have been perfectly adequate to establish and enforce a desired norm. For example, the recommendation to control massage parlours and saunas by licensing schemes[29] , a suggestion that would have been not only more theoretically justifiable and less extreme, but would also put it on par with controlling activity on premises that provided services at unconventional hours. This proposal, had it been accepted, could not even be regarded as radical, as state control would still be applied. Similar suggestions in the Israeli 1992 Bill were viewed likewise as legalising prostitution. Legislators, following public pressure, have usually still pursued the most condemning means, the criminal sanction. This observed tendency has emphasised a reluctance to use the law under other circumstances, where the only difference has been in the underlying social perceptions, remarkably regarding the punter.

This predicament is somewhat surprising since, apart from the theoretical arguments, criminal measures have not succeeded in providing adequate solutions to the social problems at issue, as has been hoped. There is little theoretical or practical support for any expectation that recent social problems, such as the mentioned upsurge in prostitution in Israel following Russian immigration, will be best dealt with by way of harsher legislation, or even by more lenient legislation. The failure of unsatisfactory legislation is emphasised by the observed trend,

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[26] Leigh,L.H. (1975a) , p.382.

[27] e.g. CLRC 1982 Working Paper, para. 2.33. The Israeli Ben-Ito Report, ch.13., The 1992 Bill proposal.

[28] See earlier discussion of criticism expressed in: Grey,A. (1975), and comparison between the unequal legal situation of heterosexuals and homosexuals.

[29] CLRC 1982 Working Paper, para. 2.38.

)mmon to both countries, of decentralising prostitution laws in the 1990s[30] , diverting from :neral control to a local one, thus abandoning what may have been one of the accomplishments the legislation following the Wolfenden Report. Idealy, the role of the criminal law in this tuation should be re-evaluated. Despite the justified calls for the legislator to be aware of the)cial aspect of ostensibly criminal activities[31] , the criminal law should not be counted on to lay a major part in such matters, beyond justified proscription and punishing, and even, to)me degree, educating. However, the prevalence of this outlook means that an alternative form f social condemnation would be regarded as far less severe and so it would indeed sustain a :ss serious perception of the act in question.

Judicial Moralism

he judicial role in treating morally sensitive issues through interpretation and sentencing atterns has been of particular importance for this study, as often the debate seems to have been)nfined to legislation, relating only to the most extreme judicial decisions. A remarkable variety f judicial attitudes and ways to enforce them, or to circumvent undesirable legal provisions, as been revealed. The review has included the widened scope of criminal liability concerning rostitution offences[32] , the reluctance to impose the law on kerb-crawlers[33] , and, opposite it, a illingness to go as far as to contravene constitutional principles, notably regarding marital ıpe[34], but also in other matters[35] . The picture is intricate. A consistent set of norms has not)parently been promoted throughout the era, although as a whole it seems to have been rather)nservative. It can not be said that the judiciary has absorbed progressive attitudes to a great ‹tent, as shown by the critique of the still lenient sentencing regarding contact rapes. The only)mmon theme is the freedom that the courts have taken to intervene where they saw fit, a

[30] See discussion of practical local attempts, Parliamentary support, Matthew's theory and)mparable experience in Tel-Aviv, Israel.

[31] Many criticisms to this effect have been mentioned. Among the first, those regarding the lack of tempt to "get down to the roots of the problem" in the Street Offences Act 1959.

[32] e.g. *Shaw v DPP* op.cit., *Smith v Hughes* op.cit., *R v Knuller* op.cit. In Israel: El-Bana v The :gal Advisor, op.cit.

[33] *Crook v .Edmondson* , op.cit.

[34] *R v R* op.cit. , in Israel: *Cohen v The State of Israel*, op.cit.

[35] One studied Israeli example is of bypassing the mandatory imprisonment for living on the earning a prostitute: *The Legal Advisor of the Government v Vagel*, op.cit.

freedom that may be construed, if *Shaw* is compared to *R v R* , as gradually following social trends at least as much as legislation does.

The issue of judicial legislation manifested yet another aspect of the debate about morality and law, possibly infringing basic legal principles. One of the fundamental arguments regarding a connection between law and morality presented the root idea of justice as the like treatment of like cases[36] . Even if the existence of a valid principle of justice requiring adherence to the law is not accepted (e.g. Lyons[37]), a view that links law with some minimal moral requirements is presumably still supported. Creative interpretation may well affront this principle.

Two contrasting examples of judicial expansion of criminal liability in morally sensitive areas, were compared. In *Shaw* [38] , the outcome was deemed by legal theorists not only undesirable but also unjustifiable by legal principles, while regarding marital rape[39] , it seemed to many that the court was merely rectifying Parliament's fault, and both parliaments were happy with their restricted function as confirming the law. Could the sacrifice of the supreme principle of autonomy be thus justified? It was argued here that despite the wider consensus about the immorality of marital rape than that regarding advertising prostitution, the basic persuasive arguments against legislative adjudication in these cases has not been altered (rejecting the 'thin ice' principle, or a claim for social defence). Judicial adherence to principles has proved to be just as crucial. When considering the public over-reliance on the courts, apparently commensurate with their own perception, it should be remembered that it is not the court's function to criticise the rightness of a certain policy, only its legality[40], however unclear the dividing line may be. Judicial legislation is not an adequate alternative for political action, and should not be regarded as such.

However, the judiciary's freedom too has been stressed, particularly following the Israeli

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[36] See Interpretation of Hart in: Lyons, D., (1993) , p.67.

[37] Ibid. at p.69.

[38] *Shaw v DPP* op.cit.

[39] Mainly *R v R* op.cit., and to a lesser degree the Israeli cases *Al-Fakir v The Legal Adviser* op.cit., *Cativ v The Legal Adviser*, op.cit.

[40] See Goldstein,S. (1983-84, at p.16.

conflict between reactionary political conditions and increasing visibility of contending moral groups, where cases such as *Danilovich*[41] , granting certain legal rights to homosexual spouses, would not have been otherwise reached.

Borders of Intervention

Two major forces have been recognised: the changing social position of women, youth, and several minority groups, against the persistence of traditional morality. The evaluation of the tension between them and its legal consequences, has formed the backbone of this study.

A social explanation to the legal concern about the family, particularly women, in the post-war period, discussed pertaining the Wolfenden Report, was suggested by Newburn[42]. Newburn's analysis of social factors was complemented by S.Hall's economic, Marxist angle[43], both analysing the reasons for focusing attention upon the importance of the (threatened) monogamous nuclear family, and problems associated with post-war youth. These two considerations have governed the discussed public debates, from perception of the visible prostitute as a threat to the family, and the need to protect the young from her and from her trade, through the re-establishment of male control over one area of female sexuality, prostitution[44], to recent debates regarding domestic violence.

The prolonged silence of women prior to the 1970s has been explained similarly, as women were led to believe they had reached equality. Female reactions to the legal situation became, as seen, organised in a significant theoretical framework only during the 1970s, a fact that have presumably contributed to the lingering influence of the unquestionable scope of the criminal law as defined by Wolfenden and to observed later legal changes.

It has been shown that neither of these concerns has been confined to prostitution, to the post-

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[41] B"GZ 721/94 El-Al Israeli Airways v. Yonathan Danilovitz and the State Employment Court, op.cit.

[42] Newburn (1992) , at p.162-168.

[43] Hall,S. (1980), at p. 22.

[44] Newburn (1992) , at p.53.

war period, or even to England.

The alleged 'crisis of family values', connected with emergence of alternative family forms, evoked periodically in both countries, has been linked to the issue of the changing role of women and the young, a situation made more complicated by the fact that the social structure is still based on marriage.

Of particular interest has been the probable conflict between growing awareness of women's rights, often admitted in Parliament[45], and the sustained traditional norms regarding the family, in a conservative political climate. The developments discerned in the studied issues have certainly reflected the unique status of the family, whether by early exclusion from the law or by the greater perceived gravity of domestic offences. Surprising conclusions concerned areas where seemingly conflicting forces have promoted very much the same practical direction, notably regarding toughening prostitution laws[46] and greater intervention in domestic affairs. The complexity of the situation has been underlined, as the motives could be either conservative (attempting to strenghten the family institution, this time through castigating the dysfunctional ones, and not, as before, through masking the issue) or supported by feminists and radicals, seeking the growing intervention of the criminal law in order to further women's rights or social benefit [47].

The principal ways in which this conflict has affected legal foundations will be reviewed.

Harm

The position of the victim, the previously largely neglected party to the process of criminalisation, has been a principal theme. The classification of both victim and perpetrator was found to be essentially guided by moral perceptions.

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[45] e.g. During the discussions of the Sexual Offences Bill, Parl.Deb.,Comm.,11.5.1990,col.509.. col.514.

[46] This remark refers particularly to Mattiews' approach.

[47] See Matthews,R. (1986) , p.199.

The prominence of protection by the criminal law was made clear early by the Wolfenden commitment '... to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable ...'[48] This definition has provided the basis not only for linking the law with protection, intrinsically dependent on harm, but also for differentiation between social groups, whether those designated as deserving particular protection or those deemed not worthy of it.

In this process, the harm principle, a fundamental starting point to any debate concerning the borders of the criminal law, has not always been respected [49], even in the mitigated theoretical variation that accepted paternalism depending on harm[50] . This moral ground and the surrender to public opinion have been repeatedly found in official documents.[51]

In both countries, the essential distinction between private and public as defining the borders of the law, has been embraced as if it had a long term established theoretical basis, not limited to possibly justifiable examples of street crimes as has been the professed attitude regarding prostitution[52] . The invisible, whoever that may be, became the unprotected. By contrast, the protection of the young has remained a central presumed role of the law. Later, it was selectively abandoned in order to allow further legal intervention, notably in domestic violence cases, which may be interpreted as freedom from unjustified criteria, allowing legal reaction to the justifiable parameter, sufficient harm[53] . However, the process of moving from disregard of harm, to its recent (discriminating) application, had to be explained. The explanation rested

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[48] The Wolfenden Report, Ch.2 para.1

[49] e.g. See analysis of the lack of any element that indicates harm regarding prostitution, such as 'nuisance', and the continuous rejection of proposals to base the law on such principle. For a proposal along this line see: Leng,R. & Sanders,A. [1983] , at p. 645. See discussion of Wolfenden's recommendation regarding cafes, stretching the harm to moral corruption.

[50] See previous discussion of G. Dworkin's theory.

[51] e.g. CLRC 1982 Working Paper, para. 1.11. and CLRC 1982 Working Paper, para. 1.22, regarding proscription of brothels.

[52] But see discussion of immediate departure from the principle by the Wolfenden Committee regarding ponces.

[53] See analysis of this concept, particularly the feminist approach, in the previous chapter, and earlier reference to Matthews' approach concerning prostitution that exemplified a another modern perception justifying further legal intervention.

largely on the paradox of political conservatism and increasing female power. It was contended that this dividing line has been inappropriate from the outset, practically and theoretically, its pursuit serving to enforce certain preferred norms. The theoretical rift between classic liberalism and theories that had been considered close to it, particularly feminism, has been specifically analysed regarding departure from the distinction, feminism calling for a greater state activism. The study has sustained this stance, but only as far as "private harm" was left outside the boundaries of the law.

Regarding prostitution offences, two main types of harm were debated: the nuisance emanating from prostitutes and kerb-crawlers and the exploitation by ponces, not confined to coercion or control[54] . These have often been overshadowed by the disputable "moral corruption". The extensive discussions of subjective harms has confirmed that legislators have treated this element and utilised it according to their moral outlook, whether by ignoring (regarding customers, and, adversely, homosexuals not quite deserving protection[55]), exaggerating, perceiving the harm as self-evident (concerning prostitutes), or by simply failing to analyse the exact nature of the harm beyond enforcing stereotypes (regarding ponces). As for offences within the family, it has been found that the recognition of harm[56] has varied with the changing times, from an almost utter disbelief regarding the raped woman, to the modern psychological arguments employed about children, perceiving the damage as often greater than in non-domestic situations. The subjective perception and quantification of harm has been consequential not only in imposing criminal liability but also in sentencing, as will be argued.

Legal protection, victims and consent

Broadening the category of 'victims', sometimes despite their consent to the act, would have widened the scope of criminal liability, while the reverse would have led to possible decriminalisation or exemption, unless victimless crimes are justified. Analysis of the inconsistent perception of the victim and adherence to paternalism has therefore been crucial to

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[54] The suggested basis for a more justifiable legal intervention, often raised and never adopted both in Israel and in England.

[55] See chronicle of the belated legal recognition of male rape.

[56] That should be distinguished from the quantification of harm for sentencing purposes.

he understanding of the delineation of criminal liability. A fundamental question regards the :oncept of autonomy, perception of a person as capable of exercising his free will.

The discussed topics have demonstrated the construction of consent as yet another legal tool for moral guidance. The more extreme examples have included adults, not obviously incapable of making their own decisions. Thus, consent of prostitutes has been largely ignored regarding the offence of living on the earnings of them, allowing the introduction of questionable paternalistic attitudes[57].

The raped wife's fictitious consent, adversely, had for a long time been presumed valid, sustaining lack of legal protection[58] . This stance may be seen as akin to legitimating the victimization. Furthermore, the analysis of sentencing patterns has shown that even when a conviction was achieved, the courts have been quick to interpret forgiveness as indicating a lesser trauma, alleviating the seriousness of the victimization and the harm[59] . It has meant that formal recognition of the victim's status would not be enough as long as prejudices are maintained.[60] Moreover, lenient sentences may not show the same commitment to the idea of autonomy that has been embodied in the shifted legal emphasis from resistance to consent.

Two competing attitudes have stood out from the analysis of differentiating interpretations of consent, a psychological perception of weakness and a socio-economical explanation.

It has repeatedly been concluded that the legal expression of a person not deemed capable indicated a superiority felt following a presumed deficiency in them, as regarding the prostitute`s "human weakness"[61], corresponding with references to the female character as prone to vindictiveness, indecisiveness or cunning. The real dilemmas of testifying against a partner,

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[57] See earlier discussion of paternalism and Feinberg's distinction between 'hard' and 'soft' paternalism, depending on the voluntariness of the person's consent .

[58] See analysis of English judicial authorities which recognised the possibility of revocation of the wife's presumed consent in a limited number of cases, usually requiring a process of law.

[59] e.g. *R v Hind* (1993) op.cit.

[60] The recently recognised possibility of a male rape victim too should be mentioned here as part of the changing perception of victims.

[61] The Wolfenden Report , para.306.

whether the ponce or the raping husband, or obtaining reliable evidence in such cases, have been given an exaggerated psychological interpretation, based on social perceptions, that has been used to excuse deficient legal treatment[62] although, as argued, those problems have not been unique to these offences. It is not surprising that the same assumptions led to a biased view of consent.

Another perception of the victimization of prostitutes, stemming from reviewed feminist and new-left writings[63], has questioned the very basis of consent, arguing that consensual activities may be damaging to women[64], hence calling to acknowledge financial pressure[65] and exploitation[66] as repudiating consent. Without this stress on the social context and the denial of autonomy, the prostitute's image would have been similar to that of the young homosexual, for example, unjusfiably perceived to be somehow weaker than others. Although official acceptance of the social interpretation of consent, with its contesting morality, is not likely, an introduction of otherwise unjustifiable legal measures has been achieved.

Individual responsibility, emphasised here, does not seem to be rated highly by either of those stances. Both views point to a legal embodiment of a perception of inferiority that denies individual responsibility, whether of gender, of sexual orientation or of young age, while only the latter is arguably justifiable, and only, it was maintained, where the statutory age is not higher than that pertaining to similar acts.

The discussed question concerning the rights of the victim in the legal process, once his position has been determined, too, has been linked to the role of the criminal law and the interests that it should protect, thus take into account, including the claim that it was set up to protect society at

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[62] See discussions of the requirement of substantiated evidence, particularly regarding prostitution where the Israeli law was changed from requiring corroboration to In 1982, the law was amended, and the requirement of corroboration was changed into the lesser need to find in the evidence material something to sustain the woman's evidence .

[63] e.g. Edwards, S. (1985b) , and Matthews, R. (1986) ,at p.201.

[64] Lacey, N., Wells C. & Meure D.,(1990), at p.306.

[65] Barton,C. & Painter,K. (1991).

[66] Lacey N., Wells C. & Meure D., (1990), at p.306.

large and not individual victims[67] .

Young victims

Concern for the youth, described by Newburn as prominent among different phenomena that have affected post-war legislation, has been frequently observed in Parliamentary and Knesset discussions, along with the courts and media, as a major determining factor in interventionist legislation. There seems to have existed an almost universal proscription of sexual intercourse with minors[68], and of youth practising what have been regarded as undesirable. if not illegal. practices, such as homosexuality and prostitution[69] . The consent of young people has been ignored in many instances, given a convenient legal veneer by increasing the age of consent selectively [70] .The consistently higher age for homosexual relationship, similar in England and in Israel, besides the legal treatment of incest, epitomise the embodiment of moral views in the criminal law. Recent Israeli legislation regarding sexual offences, and the growing public awareness of domestic abuse in both countries, show that the fear for the young is just as strong, if not stronger, and that theoretical restrictions have not been prominent among the legislator's considerations.

Domestic violence, sexual aggression, and perhaps most of all child abuse, have been analysed as metaphors for the privileged place that families still occupy in our culture, less often, perhaps, at the expense of the vulnerable. The willingness of the law, however, to recognise this extra vulnerability in some cases (concerning children) while ignoring it at other times (where contact rape has been the issue) is instructive, demonstrating the complexity of the often colliding hidden underlying perceptions.

The range has included then genuine victims who have not been recognised as such for a long time (the raped wife), those who are still very reluctantly recognised (the raped male) and. on

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[67] e.g. Shaskolsky-Sheleff,L. (1977) , at p.119.

[68] See: Rubinstein, A (1975), p.21. Note consensus observed earlier regarding procuration offences according to the Sexual Offences Act 1956.

[69] Note discussion of Wolfenden's undisputed paternalistic recommendation regarding remand in order to obtain a medical or social report: The Wolfenden Report , para.280.

[70] Not only regarding homosexuality, the obvious example. e.g. incest.

the other end of the scale, those who have been perceived as victims even though they would prefer not to be categorised as such (prostitutes who would like to live with their partners, young adults who want to practice prostitution, youth consenting to incest). It has not necessarily always been to the benefit of the person in question. Over-protection, that has been recognised as a mistake in other legal territories (mainly positive discrimination in employment law[71]), is just as questionable here[72]. Recognition as a victim has not always responded to the possibly objective notion, harm, or to autonomy. Rather, it has relied on a moral foundation, just as the categorisation of the offender has been, changes in classification indicating changing social perceptions.

Perception of The Deviant

The legal process has also been found to reflect legislators' characteristics in creating a league of 'second class males', those that have been despised because they do not conform to a 'standard of normality' and can therefore be condemned through the law, such as homosexuals and ponces. A primary way to prove it was through comparison to the legal treatment of 'the normal male', mainly the punter[73] , with whom the legislator could arguably feel more affiliation.

The differentiating legal treatment of the 'normal' male, the "perfectly respectable" has served as the standard by which any seemingly discriminating legal attitude was verified. The customer's stronger position has been stressed throughout the account, compared to the female prostitute, particularly in the overwhelming importance attached to the fear of incriminating the innocent[74] . Although less often, the "respectable" woman has also been used by the legislator to justify prejudiced legislation, notably regarding the continuous use of the term "common prostitute"[75] .

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[71] See: Fiss,O.M. (1993), from p.8.

[72] e.g. See discussion of the Israeli welfare provisions regarding young prostitutes, which in the Youth Law (treatment and supervision)1960 would justify an arrest in order to coerce the youth to see a welfare officer.

[73] See the foregoing lengthy comparisons, particularly regarding the inapplicability of s.32 of the SOA1956 to kerb-crawlers and the unsatisfactory eventual legislation.

[74] e.g. See discussions of the numerous formulations of the kerb crawling offence, Sexual Offences Act, 1985. S.1., and preceding Parliamentary debates.

[75] See discussion of the Street Offences 1959, and quotations from the Parliamentary debates. e.g. Hansard, Parl.Deb., Comm. Standing Committees,1958-59,vol.4,col.107.

thus stressing even further the isolation and inferior social position of the deviant.

A portrayal of the deviant as not only anti social but somehow lacking in his persona, just as his victim has often been[76] , has not been abandoned[77], resulting in an enduring reluctance to see the respectable as criminal, whether the punter or the raping husband, besides the obvious consequences for the deviant, such as restrictions that would not have applied to others[78]. Thus, the presumed inferiority of the involved has enforced not only legal gender bias but a general bias against less powerful groups in society.

Sentencing

Sentencing policies and imposed sentences have exemplified the legal absorption of norms through the perceived seriousness of the offence[79] . As it has been recognised that even someone who regarded preventing harm as the sole justification for punishment, following Hart, may nevertheless refer to moral principles while prescribing the appropriate severity of the sanction[80], the prime interest has been with sentencing as a quantification of condemnation and of social interests, after culpability and harm have already been established by the imposed criminal liability. Sentencing patterns may have thus created a different picture to that presented by criminalisation. A persistent correlation between sentencing policies and changing perceptions has been established, and its validity sometimes questioned, particularly when a consensus has been assumed by a hasty legislator.

Incarceration has been principally evaluated as the severest, most significant penalty. Of all

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[76] Prostitutes being in a curious position as they could be equally seen as offenders and as victims.

[77] e.g. Remarks of the Israeli Committee on the Status of Women (1978)op.cit. regarding prostitutes as psychologically faulty. The portrayal of prostitutes has had a double significance, as they have sometimes been treated as victims, principally where ponces have been considered, and at other times as offenders.

[78] Such as, in relation to prostitution, doubts in her mental capability leading to restrictions masked as rehabilitative: e.g. The Wolfenden Report , para.280, getting a social/medical report.

[79] We are concerned here with the sentence announced in court, not the actuality following parole.

[80] Hart,H.L.A. (1963) .

possible sentencing aims[81] , changing according to political perceptions, not only directed by legal theories[82], but sometimes mainly by public opinion, expressing reproach has been particularly problematic and instructive[83] . The comparison has not shown any fundamental cultural differences between England and Israel, judging by penal policies.

A prime example has been the severe sentences deemed appropriate for ponces, by every official body, from the Wolfenden Committee[84] onwards, indiscriminately. The decision to impose prison sentences on prostitutes despite awareness that it would amount to authorisation of an increased rate of commercial exploitation was another example[85]. While it may have been partially justified (by paternalism) in an era dominated by rehabilitation, or believing in 'kindly coercion', being more punitive in order to 'protect' women, it was far more debatable in later. disillusioned times. Its continuous retention, and the inadequate eventual abolition, were interpreted as showing, at best, indifference. The legal systems have not been particularly 'chivalrous', as sometimes assumed[86] .

The symbolic expression of social condemnation has been exceptionally evident where a comparison to similar offences proved disproportionality, as no justification has been found for divergent sentences. The systems have been consistently lenient regarding males who have been closer to the 'standard of normalcy', in sentencing as in criminalising, except when children have been involved. Thus, those who were severely punished were the outcast, the morally blameworthy, those who solicited other males, or those who exploited children. The 'normal' has been treated lightly, even if the offences were of the severest type. Note, for example, the

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[81] e.g. See discussion in: Ashworth,A.(1994a), from 207.

[82] Particularly changing attitudes towards the chances of rehabilitation of prostitutes. e.g. The short lived hope expressed in the Wolfenden Report in creating the cautioning system and in supporting probation, already abandoned by Parliament in the discussions regarding the 1959 Act and disillusionment in: Report of the Working Party on Vagrancy and Street Offences (1976) op.cit., para.93.

[83] For a discussion of disapprobation as justification in itself, following Durkheim and Stephen, see: Walker, N. (1981). Walker,N. & Marsh,C. (1984) . *R v Sargeant* (1974)60 Cr App Rep 74.

[84] The Wolfenden Report , para.307. The minority called for severer punishment: Ibid. at p.128. Reservation of Cohen,C., Lovibond,K. and Stopford,L.

[85] See discussion of The Wolfenden Report, para.286-287.

[86] Heidensohn,F., (1985), at p.32.

deep reluctance to impose prison sentences on soliciting of females by males, compared to other soliciting offences, a situation that has led, along with the issue of safeguards, to the unjustifiable retention of unnecessarily separate offences. A similar conclusion emanated from the review of the consistently lenient sentences regarding rape of a partner, where the lower condemnation level has been expressed in the greater weight being given in the sentencing process to elements of violence and threats[87], although these had been restricted by the statutory offence to aggravating circumstances.

The picture may have recently been gradually changing at least in domestic affairs. It seems that caution in order to retain family values has had a price, but this price may now be deemed too high and that the violent male may be punished more severely. On the other hand, the abused who kills his abuser is seen in an increasingly forgiving light, and will possibly be spared.

The discussed issues have allowed an examination of opposite trends, from calls to "get tougher" with ponces and sexual abusers, denouncing the lenient legislator and judge, to calls to "show compassion" towards the above mentioned homicide convicts. Such public campaigns have all been unmistakably motivated by a changing quantification of the offender's culpability, and have generated moral crusades, in the name of "justice" that should be done.

Questionable official manifestations of surrender to pressure have included legislative and pre-legislative attempts[88] designed to attract public support[89], and even apparent judicial acceptance, embodied in either imposing heavier sentences[90], notably compared to marital rape, where public pressure has not been as immense, or in adopting a sudden leniency.

While this, and the inconsistent judicial development, have accentuated the need for principled sentencing[91], cases of severe legislative limitation on the court's discretion have too been reviewed as a way of securing morality in law, especially regarding panic provoking offences.

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[87] e.g. *R v Haywood* (1991) 13 Cr.App.R.(S.) 175. *R v W* (1992) 14 Cr.App.R.(S.) 256.

[88] e.g. See discussion of the offence of living on the earnings of a prostitute.

[89] Notably Israeli suggestions to impose minimum sentences on sexual offences.

[90] e.g. See discussion of Israeli sentencing of offences within the family.

[91] See Ashworth,A. (1994a) , at p.215.

evident in recent support for minimum sentences in sexual offences, and the mandatory imprisonment on certain prostitution offences in Israel. In this case, it is the legislative authority that seems to have stepped beyond its limits, motivated by momentary hysteria.

Sexual Politics and a Conclusion regarding Feminism

Correlation between stigmatising and criminalising has been detected, regarding actions which were hardly the examples of universally condemned acts such as murder or rape, indicating an existing connection between morality and legislation. A singular importance, undoubtedly derived from morality and enforcing it, is apparently still attached to sexual matters, even if they are comparable to other offences in many respects, an attitude that has often led to rejection of suggestions to extend the law to activities of non-sexual nature in order to achieve greater legal conformity[92]. Although it has been clearer about prostitution laws (regarding which, as seen, even radical opinions have not been unequivocal), the analysis of marital rape too has shown a complex picture of a system largely reluctant to relinquish its fundamental bias. Although in Israel the exemption had been abandoned earlier, the long overdue statutory abolition of the marital rape exemption in both countries attests in itself to enduring indetermination.

The argument may start with the contradicting and hesitant authorities that preceded the decision in *R v R*, described at length elsewhere. Positively, the process may be seen as a gradual assimilation of feminist notions. Adversely, though, it may be seen as a last bastion of chauvinist perceptions, trailing a long way behind social trends. The application of inappropriate alternative offences to the same facts[93] described a similarly ambiguous stand, essentially sustaining the exemption rule, pursuing alternatives in order to avoid putting the husband and the 'regular' rapist on equal terms. The predicament of the legislator had been similar, with the partial and unsuccessful legislative attempts prior to the 1990 recommendation[94] .

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[92] e.g. H.O.(1974). para.238-239 in relation to soliciting offences.

[93] Such as assault , *R v Miller* [1954] op.cit. And see application of exemption to assault in *Henry* . reported in the 1990 Working Paper, op.cit., p.98.

[94] 1990 Working Paper, para.5.2. 1992 Report, part V.

The notion of a double standard, restricting women's sexuality while encouraging a man (more precisely, heterosexual) to be active, mentioned as a crucial part of the radical and feminist theories, may have been lessened, but not relinquished. The persistence of prostitution laws in their unchanged form indicates the endurance of a prominent relic of this notion, hence the importance of the comparison between the legal situation of prostitution and marital rape in order to offer a complete picture of the present sexual politics. Essential to the comparison has been the observation that prostitution campaigns have never been accorded the widespread support given to domestic violence, even by the women's movement, supporting the theory of the connection between power structure and criminalisation. The hugely inadequate legal treatment of kerb-crawlers and ponces in both countries, along with the lenient sentences following the ostensibly radical *R v R* , may well be construed as further legal authorisation of the sexual politics. The growing visibility of groups such as prostitutes or homosexuals, without a significantly increased political power[95] , has apparently not been enough.

Other mentioned contemporary debates, including the one regarding cohabitees, demonstrated Smart's assertion that "for some, legislation represents the triumph of liberalism over Victorian hypocrisy and repression. For others, it symbolises the moral decline of the nation." The analysis of the laws regarding prostitution and marital rape supports the complex feminist view of the uneven development of the law, sexual politics and power relations. It also shows that although the subject matter has changed, the arguments have not. While thirty years ago espousing homosexuality, and to some extent prostitution, was regarded as an indication of a sick society, bereft of any moral standards, now it is the position of alternative families. In both cases the law was called to intervene and to impose morals, legal intervention being seen as an obvious remedy to alleged social deficiencies.

It has been asked, and often doubted, whether the legal system is capable, under current sexual politics[96] , of fulfilling the early feminist expectations for a social change, and if it should be pursued at all. However, it does not mean that feminist calls to 'de-centre' the legal system hold a more realistic attitude towards the system's capabilities.

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[95] Some power increase may be detected in the legal changes to the age of consent, but it is still not as low as the homosexual lobby campaigned for.

[96] See Smart,C. (1976) , from p.77.

The stance that has been pursued here is that a certain assimilation of morals is justified only as long as it is sustained by legal principles, rather serving as a tool for acknowledging harm, while being still committed to a minimalist approach, according supremacy to the principle of autonomy. The recent seriousness allocated to domestic violence cases, for example, has probably been motivated by greater visibility and influence of 'new morality', largely that supporting women's autonomy, but it still conforms to criteria for criminalisation. Furthermore, the assimilation in those cases has actually rectified a faulty situation and allocated a symbolic value to the legal condemnation (recognised, for example, the removal of the husband's right to demand sexual intercourse at any time[97]). It is this symbolic function which arguably unnecessarily stigmatised prostitution while regarding offences within the family it unjustifiably condoned. Similarly, certain legislation concerning prostitution may be justified by recognition of the prostitute's position as a victim. The achievements of the movements and activists who supported criminalising domestic violence, that succeeded to a large extent in persuading legislators, victims and the public of the transformation needed of the definition of the private sphere, is encouraging. In this respect, de-centralisation of the legal system would be undesirable, since it has been shown as capable of changing, if slowly. To use but one example, it may well be argued that lenient sentences imposed on raping husbands are still much better than an exemption, in the condemnation thus conveyed. Abused women at least have the option, grim as it still is, to turn to the authorities and hopefully, but surely more likely than ever before, be taken seriously.

Conclusion- "Justified" Spousal Homicide

I would like to conclude with one example that encompasses most of the themes raised here, and that carries a heavy burden of evolving social perceptions and prejudices. This dilemma transcends the issue of offences of a pronounced sexual nature, although maintaining the unique character of offences within the family. Not only that, but it demands a legal expression of alleviated culpability where the greatest harm is on balance, the right to life[98] .

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[97] Harrison,K. (1991) at p.1490.

[98] It seems rather unnecessary to support claim of the importance of this right. One source is Art. 2 of the European Convention for the Protection of Human Rights and Freedoms(1953).

Spousal homicides have been mentioned in the context of domestic violence and legal defences. The media's prominent part in increasing visibility and generating sympathy towards those, mainly women, who kill their abusive spouses, has too been observed[99]. A closely related theme, that has risen here under different guises, is the influence of public opinion on incorporating moral views into the legal system.

Official endorsements of the current public attitude have been manifested. Thus, the Israeli Minister of Justice has appealed to the Israeli president, to reduce the sentence of Basso, who had killed his father[100].

Besides the theoretical questions concerning the validity of legal defences in such cases, the legal basis for some of the contemporary suggested legal changes, may be debated. A female Justice of the Israeli Supreme Court, D. Dorner, suggested recently to establish in legislation that an abused woman, upon killing her husband, would be charged with manslaughter rather than murder[101]. Such a sweeping policy would have further reaching implications, being more extreme than recognising the acceptability of defences under certain circumstances, and would go far beyond allocating the power of discretion to the prosecution, taking into account specific circumstances in individual cases, as has been done until now. The desirability of this step is questionable. Considerations other than the sanctity of human life are granted precedence, principal among them the alleged culpability of the silent society. Consequently, blameworthiness as well as harm are considerably, though conceivably unjustifiably, lessened, reducing the overall seriousness of the offence. In this respect, of reducing the symbolic seriousness of the offence to insignificance, it is comparable to the mentioned objections to a general policy that introduced previous relationship as mitigating in all contact rape cases[102],

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[99] See, for example, the vast (and generally supportive) English media coverage of Sara Thornton's case (op.cit.), e.g. Dyer,C. , *The Guardian*, 29 July 1995. The Israeli mentioned case of Basso.

[100] As reported in *Ha'aretz*, 24.1.97. The case has been mentioned earlier, in the context of the provocation defence.

[101] The suggestion was made in a lecture , not in court. Reported in: Reinfeld,M., *Ha'aretz*, 22 January 1997.

[102] See analysis of sentencing in contact rape cases. Mitigation has been very much determined as customery in the leading case of *R v Berry* (1988) op.cit.

instead of taking specific circumstances into account. Furthermore, even if one holds that sentences are not always expressive[103] , they may well be so in communicated cases, such as many of those discussed.

It is submitted that the acceptance of this attitude will collide with the conceptual legal framework while other ways, less damaging, are available, preferably by widening the defence of provocation to cover cumulative acts, or counting on the professionalism of the prosecution, motivated to an extent by similar public awareness and pressure, admittedly granting an opportunity to promote morality. It is quite doubtful whether an extensive alleviation of charges, affirming the doubts in the professional ability of the justice system agencies through legislation, would contribute to any greater respect of the law. Dorner's attitude serves as a prime example of attempted enforcement of a normative change. It has been stressed before that just as theoretical justification could not be set aside lightly while promoting conservative moralism, so it should not be done regarding legislation of seemingly progressive ideas, as this suggestion would take the process out of the realm of sentencing and into changing the criminal liability, where moral considerations would have been more questionable. Throughout this account it has been confirmed that changing the criminal law has been the first suggested solution to many social evils, and that legal principles have had to be succumbed. It is perhaps more surprising but not all that rare to find that legal agents themselves have been eager to abandon legal principles, leaving the theoretical discussions reviewed here as mere abstracts.

Is this legal way the right means to clear the suddenly awoken social conscience? The alleged culpability of society, based on reluctance to interfere with violent domestic relationship, could probably be tackled by means other and more suitable than criminal legislation. As aside from theoretical impediments, in many cases it has not been a great practical success, this study shows that other ways, including education, should probably be explored long before the criminal law is involved. Alternatively, it may well support demands for effective formal intervention in earlier stages of the domestic dispute. If cases of violence are easily dropped, as has been argued before, whether following the victim's wish or police's policy, it may indeed be seen as a culpable societal silence, stemming from inappropriate enforcement of 'family

[103] See Walker, N. (1981). at p.112.

values'. However, had the situation deteriorated due to the lack of intervention, it would not necessarily justify attaching such a weight to the social reaction.

The interrelations between social forces and individual choice, one of the main contentions in the debate surrounding the studied offences, have related to sentencing as well as to criminalisation. While it has been shown that legislators have adopted the view of punishment as a goal in its own right, in prescribing particularly heavy penalties, others, such as Hood, have claimed that a good policy must take into account the social forces which shape and constrain individual ability to exercise choice[104], suggesting that it may be achieved by adopting "soft determinism". However, reservations are especially serious in such a case, where the alleged social culpability is remote enough to be seen as indirect regarding the individual case, inferring that the next step could be to consider as legitimate remote social effects on other types of defendants and acts or to impose legal duties on the bystander, a separate weighty question. Would anyone demand that the same social culpability limit criminal liability in the adverse case, of an abuser killing the abused? The outcome is a diminution of the woman's autonomy, a fundamental requirement not only for criminal liability, but also for any normative system that promotes women's rights and esteem. It is comparable to reservations expressed previously regarding proposals to recognise financial threats as coercion. Interventionism, state activism and social control are taken to the extreme. Theoretically and practically, then, the approval of an emphasised social explanation as directing policies, runs the risk of systematically neglecting to consider the possibility of individual self-determination[105] and responsibility, a notion that is firmly linked to the value of autonomy that has been supported throughout this account.

This attitude is not dissimilar to the particular analysis of the prostitute's situation as stemming from a basic inadequacy[106] , or the raped wife as prone to cunning and hysteria, qualities that make them more fragile but also inferior, preventing them from exercising reason. The similarity is in the presumption of a woman largely incapable of controlling her own life, although opposing legal consequences follow, justifying state intervention in one case while excusing the woman in the other.

Most of the recent legal changes have been analysed as stemming from and reflecting rather

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[104] Hood,R. [1987] .

[105] See Smart,C. (1976) , at p.93.

[106] See discussion of Wolfenden's recommendations in light of the theory of: Greenwood & Young (1979) , at p.158.

traditional views, only rarely permitting an expression of influence of a radical thought. Prostitution laws and the marital rape exception have been used as examples in the debate for a long time. The possibility of unjustifiably enforcing "a new morality" seems to have been very much overlooked, often referred to as an unsubstantiated and scorned conservative fear. This last example has therefore been chosen to demonstrate the equal danger of succumbing to progressive morality without an appropriate basis, as has been done in relation to the judicial creativity[107] and to proposals such as that of introducing minimum sentences for sexual offences.

Pointing at the shortcomings of this stance should not be regarded as subversive, contradicting the goal of promoting women's issues and female autonomy. On the contrary, the review of impetuous laws, mostly unsuccessful, should make it quite clear that an endeavour to fit new legislation into an existing framework of principles, requiring a thorough consideration of any suggestion within the compound of legal rules, could only be beneficial. Incorporation of far reaching socially based moral ideas into the law could inadvertently help to maintain the gender bias. While gender differences do exist and should be acknowledged, they should not presume an inferiority of one sex, whether the presumption originated from a chauvinistic point of view or from a feminist one. Bearing this danger in mind, one could hardly over- stress the importance of adherence to legal guidelines, respecting, to an extent, self-control.

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[107] See prolonged discussion of *R v R* and the comparison to the Israeli situation.

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